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IN THE

Supreme Court of the United States

DAVID SHOPE, HANK KLUMPP, CHARLES SHOOP, ROBERT BEST, RUTH BEST, ANDREW DRYSDALE, LOIS DRYSDALE, JERRY W. KERN, and SANDRA KERN,

Petitioners,

v.

STATE OF NEW JERSEY, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL, and NEW JERSEY WATER SUPPLY AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a State Statute which only promotes the public purpose of preserving undeveloped land in its natural state and which directly results in a seventy-five percent (75%) depreciation in property value, with an aggregate equity loss of $15 billion dollars, result in an unconstitutional taking of property without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Whether the right to farm should be recognized as a fundamental right, and therefore any legislation regulating farming should be subject to a higher standard of scrutiny?

PARTIES TO THE PROCEEDING

The parties below are listed in the caption with the exception of the County of Warren, which did not participate in the appeal since as a political subdivision, it could not assert U.S. Constitutional violations against the State of New Jersey.

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Book of Genesis, The Holy Bible, King James Version 9, 13, 14

Rand, Ayn, "Man's Rights", *Capitalism: The Unknown Ideal*, Penguin Group (USA) Inc., copyright 1946, 1962, 1964, 1965, 1966 15

PETITION FOR WRIT OF CERTIORARI

David Shope, Hank Klumpp, Charles Shoop, Robert Best, Ruth Best, Andrew Drysdale, Lois Drysdale, Jerry W. Kern, and Sandra Kern respectfully petition for a Writ of Certiorari, to review the judgment of the Appellate Division of New Jersey, which was denied certification by the Supreme Court of the State of New Jersey.

OPINIONS BELOW

The opinion of the New Jersey Appellate Division was decided on September 4, 2009 and is reported in *County of Warren, et al. v. State of New Jersey, et al.*, 409 N.J.Super. 495 (App.Div. 2009), 978 A.2d 312; it appears at Appendix A to the petition. Petitioner's Appendix (Pet. App.) 1a – 27a. The opinions and rulings of the trial court (New Jersey Superior Court, Law Division, Mercer County) were not published. The May 15, 2008 Order denying plaintiffs motion for reconsideration appears at Appendix B. Pet. App. 28a – 30a. The April 11, 2008 opinion of the trial court denying plaintiffs motion for reconsideration appears at Appendix C. Pet. App. 31a – 34a. The January 18, 2008 Order of the Superior Court of New Jersey, Law Division, Mercer County dismissing the complaint appears at Appendix D. Pet. App. 35a – 36a. The January 18, 2008 opinion of the trial court granting the motion to dismiss the complaint appears at Appendix E. Pet. App. 37a – 45a. The Order of the Supreme Court of New Jersey denying the petition for certification dated January 12, 2010 and filed January 14, 2010 appears at Appendix F. at Pet. App. 46a – 47a.

STATEMENT OF JURISDICTION

The Order denying certification by the New Jersey Supreme Court was signed January 12, 2009 and filed on January 14, 2009. The opinion of the New Jersey Superior Court, Appellate Division, was decided September 4, 2009. The Order of the New Jersey Superior Court, Law Division, denying the plaintiffs' motion for reconsideration was filed May 15, 2008. The Order of the New Jersey Superior Court, Law Division, dismissing plaintiffs' complaint was filed January 18, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the final decision by the New Jersey Courts of United States Constitutional issues.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment of the United States Constitution provides in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. 8.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the Equal Protection of the laws." U.S. Const. Amend XIV, §1.

STATEMENT OF THE CASE

The New Jersey Highlands Act is a policy initiative of massive scope and utopian ambition. Water conservation and preservation of open space are to a substantial extent pretexts or euphemisms for what is in fact an anti-development measure. The net effect of the entire legislative scheme, when fully implemented, will take 859,000 acres, or about 1,342 square miles, and place it off limits to development. A consequence to private landholders is a loss in the value of their property so great as to be tantamount to public confiscation. These are among the conclusions contained in a political scientist's expert report which, together with the extensive record below including the expert reports by a hydrogeologist, real estate appraiser and professional planner, illuminate the Act's constitutional violations.

The issue of whether the New Jersey Highlands Water Protection and Planning Act is a taking of private property by the State without just compensation was raised by the opinions of the Trial Court and the Appellate Division denying Plaintiffs' challenge that the Act was a violation of their constitutional right to equal protection.

Plaintiffs had submitted expert reports and documentation, including a 2003 interoffice memorandum from the Administration of Governor James E. McGreevy, which demonstrated that the true purpose of the Act was to serve as his environmental legacy by implementing the eco-socialist response of environmental lobbyists to the 2002 United States

Forest Service and Department of Agriculture Study of the New York/New Jersey portion of the four-state Highlands Region: freeze all further development in the 859,000-acre area under the guise of water resource protection. As an arbitrary, manipulated and fictional designation without a scientific or rational basis, plaintiffs asserted that the "preservation area" established by the Act violated ordinary economic interests as protected by the equal protection provisions of the New Jersey and United States Constitutions.

On motion for reconsideration, plaintiffs raised the issue of whether the right to farm is a fundamental right entitled to enhanced protections under the due process clause of the Fourteenth Amendment. While a farmer's equity reflects the development potential of the land, it is not synonymous with an interest in developing or selling the land. The average 75% diminution in land value caused by the Highlands Act destroys a farm's equity, which is needed as collateral to borrow against for equipment purchases, capital improvements, working capital, and to buffer lean years. Land value is the primary asset of a farm business. By destroying land equity, the Act makes it impossible to engage in farming as a livelihood.

The Complaint was filed in conjunction with the County of Warren, a political subdivision of the State of New Jersey whose elected Freeholders are, pursuant to their oaths, sworn to uphold the Constitution of the State of New Jersey and the United States. The Complaint alleged constitutional violations under the New Jersey Constitution, since as a political subdivision, the County could not assert federal constitutional claims

against the State. An amended pleading asserting the parallel United States Constitutional violations and a separate count asserting violations under the Civil Rights Law, § 1983, was attached to a motion to amend the pleadings filed on behalf of the nine individual plaintiffs, who are property owners and farmers within the Preservation Area representative of all those whose rights have been violated.

In addition to denying this motion, the Trial Court denied an application to have the pleadings amended to merely add the federal citations, indicating that the New Jersey courts and Constitution were fully capable of protecting plaintiffs' rights under the United States Constitution. To the contrary, the trial and appellate decisions establish that the New Jersey Highlands Act is a $15 billion dollar uncompensated taking unprotected by the Constitution of the State of New Jersey.

The Appellate opinion analyzed plaintiffs' proofs and argument pursuant to takings principles as applied by New Jersey Courts and concluded that the Plaintiffs could avail themselves of the Act's waiver/takings application mechanism or receive compensation pursuant to the Highlands Transfer of Development Rights (TDR) program. The takings/waiver mechanism is an economic futility and practical impossibility. The only statutory mechanism to compensate property owners for the taking of 75% of their property value in the 415,000-acre preservation area is a TDR program, which six years after the Act's effective date remains chimerical, has not generated a single transaction, and can never function on the necessary scale to address the takings since it requires voluntary participation by municipalities.

In its holding, the Appellate Division goes beyond violating the Constitutional protection from State takings of private property without just compensation to violation of the fundamental right to own private property which it protects. The Court held:

> "Plaintiffs argue that Count Four of their Complaint was erroneously dismissed because the Highlands Act's establishment of the Highlands Region with a core preservation zone is 'a legal fiction without scientific basis.' They assert that the Highlands land area is distinguishable from the hydrogeologic conditions in the Pinelands, where those conditions warranted regulating the land by establishing a preservation area. For present purposes, we will assume that they are correct. However, they ignore the legislative findings contained in N.J.S.A. 13:20-2 that expressed the legislature's concerns to protect other exceptional natural resources such as clean air, contiguous forest, lands, wetlands, pristine watersheds and habitat for fauna and flora," as well as "many sites of historic significance."

In other words, the State's interest in preserving open space is in itself sufficient to justify exercise of police powers through regulations which prevent use of private property.

In order to understand how the Act violates the fundamental right to own private property, analysis begins with English Common Law and the concept of

livery of seisin. No real right to land could be transferred without livery of seisin, a ceremony with witnesses generally standing on the land itself. Accompanying the words "Know ye that I have given," the feoffee was then handed an object representing the land such as dirt, turf or twigs. Over a period of hundreds of years, the delivery of a deed came to replace delivery of twigs, but the concept of physical possession and ownership of land remained.

At the time of the American Revolution, the English Common Law of real property was fully established, but with a caveat: we were a free people with liberty to own private property without any obligation to the English Crown. Our Constitution protects that right by forbidding the State from taking property for a public purpose without payment of just compensation.

Under current property law theory, instead of twigs symbolizing possession and ownership, property ownership is likened to a bundle of sticks. Each stick represents a different property right. As long as the government reasonably exercises its police powers in the form of environmental regulations and doesn't take too many sticks away, there is no violation of the right to own private property with constitutional protections from takings by the State.

Arguments for environmental regulations imposing preservation standards are premised on the public interest that preservation of land in its natural state is a universal, absolute and paramount State interest. An individual may own private property, but the State's interest in preserving it justifies leaving the owner with

one stick: the right to use the land as open space for the benefit of the public. This consequence mirrors the Marxist based eco-socialism concept of common grounds replacing private property. It is based on a usufructary property law system rooted in Roman Civil Law which is alien to our Common Law concept of private property. The New Jersey Court's decision validates the variant of eco-socialism embodied by the Highlands Act.

Plaintiffs' Petition for Certification to the New Jersey Supreme Court was denied on January 12, 2010 and filed January 14, 2010.

REASONS FOR GRANTING THE PETITION

The State of New Jersey enacted the *New Jersey Highlands Water Protection and Planning Act* (*N.J.S.A.*13:20-1 *et seq.*) The Act prohibits development within 410,000 acres area mapped by the State Department of Environmental Protection. The Highlands Act itself concludes that it will result in the "taking of private property" and therefore provides a "compensation" mechanism for harmed property owners known as the "Transfer of Developments Rights Program". (*N.J.S.A.* 13:20-13) However, the Transfer of Developments Rights Program is an impossibility based on its voluntary nature and the massive scope of the takings which will not compensate the landowners for the taking of *seventy-five* percent of their property value. The Highlands Act authorized the DEP to develop regulations to implement a waiver process. (*N.J.S.A.* 13:20-33(b). The DEP promulgated Takings Waiver Application process *N.J.A.C.* 7:38-6.8, which plaintiffs are required by the New Jersey Supreme Court to

exhaust before asserting a takings claim, is an economic futility leaving no remedy to challenge the taking by the State of New Jersey.

Additionally, this case raises an extraordinarily important and difficult issue. Should farming be recognized as a fundamental right and therefore subject to strict scrutiny or intermediate scrutiny protection under the Fifth Amendment Due Process Clause? The right to farm is a right that does not have its origin in the United States Constitution but in the Holy Bible. Farming can be traced back to the Bible's Book of Genesis as a gift given to mankind for our subsistence. In addition, farming is a natural right that is deeply rooted in our great Nation's history and regulation of farming should require a heightened level of scrutiny.

I. THE COURT SHOULD DECIDE WHETHER REGULATION OF FARMING SHOULD BE SUBJECT TO A HIGHER STANDARD OF SCRUTINY

The right to farm is a right which is deeply rooted in the Nation's History, that neither liberty nor justice would exist if said right were sacrificed. In fact, the right to farm is a natural right, which has it's roots in the *Book of Genesis* and God.

The Supreme Court has historically found constitutional protection to apply to those liabilities "implicit in the concept of ordered liberty [such that] neither liberty nor justice would exist if [they] were sacrificed." *Moore v. City of East Cleveland*, 431 U.S.494, 503(1977). The Due Process Clause guarantees more

than fair process. *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S. Ct. 2258, 2267, 138 L.Ed. 2d 772(1997) (citing *Collins v. Harke-Heights*, 503 U.S. 115, 125 S. Ct. 1061, 1068-1069, 177 L. Ed. 2d 261 (1992)). "The clause also provides heightened protection against governmental interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 at 719, 117 S. Ct. 2258, 226). The Supreme Court has held that there are additional rights which are implicit in the Due Process Clause. Those rights, which the court has labeled as fundamental include:

> "the rights to marry, *Loving v. Virginia*, 388 U.S.535, 87 S. Ct. 1817, 18 L. Ed. 2d 1010(1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S. Ct. 1817, 86 L. Ed. 2d 1665(1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 2d 1042(1923); *Price v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L.Ed. 2d 1070 (1925); to marital privacy, *Griswald v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510(1965); to use contraception, *ibid*; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S. Ct.205, 96 L.Ed.2d 183(1952); and to abortion, *Casey, supra.*"

Washington v. Glucksberg, 521 U.S. 702, 721, 117 S.Ct. 2258, 2267.

The Supreme Court has established a "method of substantive-due-process analysis [which] has two primary features: rights and liberties which are objectively, 'deeply rooted in the Nation's history and tradition', and 'implicit in the concept of ordered liberty', such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* at 721,722, 117 S. Ct., at 2268. The *Fourteenth Amendment* forbids the government from infringing upon fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling State interest. *See, e.g., Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1(1993).

Legislation reflecting the existence of the right to farm is now in effect in all 50 states. Forty-six of these were in place as of 1983 and were developed in response to the increased demand for agricultural products and the substantial changes in population patterns in the 1970's. Comment: Right to Farm Laws: Breaking New Ground in te Preservation of Farmland, 45 U. Pitt. Law Rev. (1984). While the legal mechanisms to protect the right to farm focused on exemption from nuisance liability caused by various aspects of agricultural production, proponents of the legislation made clear that the right to farm was a fundamental right. In New Jersey, the Right to Farm Act was one of several related pieces of legislation which were developed by the New Jersey Secretary of Agriculture and agricultural organizations. The legislative history submitted by plaintiffs for judicial review of this issue included initial drafts of the New Jersey Right to Farm Act, which explicitly interpreted the Constitution to provide New Jersey citizens with an "inherent right" to farm the land.

In addition to State legislation, many municipalities adopted similar ordinances recognizing the right to

farm. Several of the fourteen Warren County Municipalities whose ordinances were submitted for review made specific findings to justify the legislative enactment:

> "The Mayor and Township Committee being aware and having studied the character, history and economic, sociological history of the Township and upon the finding that the historical economic backbone of the Township of Franklin has been that of a farming and agricultural community and in furtherance of protecting the agricultural rights that have existed for hundreds of years . . ."

> "The Township Council finds that farming has existed and has been carried on in the Township for hundreds of years and long before the residential development that has since been prevalent in the Township. . . . the Township Council finds and determines that farmers must be secure in their ability to earn a livelihood and utilize customary farming procedures and techniques."

> "Recognition of Right. The Township of Blairstown recognizes the industry of farming is a natural right and that this industry has been the main source of income and occupation since the founding of our Republican State."

Review of the roots of the right to farm demonstrate that it is a natural right and is among unalienable rights the Declaration of Independence holds has been

endowed by the Creator. The Divine origin of this right is apparent in the Book of Genesis from the stories of Adam' fall from the Garden of Eden, the judgment and punishment of Cain, and the covenant with Noah after the Great Flood.:

> "And the Lord God planted a garden eastward in Eden; and there he put the man whom he had formed." Genesis 2:8 "And out of the ground made the Lord God to grow every tree that is pleasant to the sight, and good for food;" *Id.*, 2:9 "And thc Lord God took the man and put him into the Garden of Eden to dress it and to keep it." *Id.*, 2:15 "And unto Adam he said, because thou hast hearkened unto the voice of thy wife, and has eaten of the tree, of which I commanded thee saying "thou shalt not eat of it": cursed is the ground for thy sake; in sorrow shalt thou eat of it all days of thy life;" *Id.*, 3:17 "Thorns also and thistles shall it bring forth to thee; and thou shalt eat the herb of the field;" *Id.*, 3:18 "Therefore the Lord God sent him forth from the Garden of Eden to till the ground from once he was taken." *Id.*, 3:23.
>
> "And Abel was a keeper of sheep, but Cain was a tiller of the ground." *Id.*, 4:2 "And he said, what hath thou done? The voice of thy brother's blood crieth unto me from the ground." *Id.*, 4:10 "And now art thou cursed from the earth, which had opened her mouth to receive thy brother's blood from thy hand;" *Id.*, 4:11 "When thou tillest the ground it shall

> not henceforth yield unto thee her strength; a fugitive and a vagabond shall thou be on the earth." *Id.*, 4:12.
>
> "And God spake unto Noah saying, Go forth of the ark, thou and thy wife and thy sons and thy sons' wives with thee. Bring forth with thee every living thing that is with thee of all flesh, both of fowl and of cattle, and of every creeping thing that creepeth upon the earth;" *Id.*, 6:18 "And the Lord smelled a sweet savour; and the Lord said in his heart, I will not again curse the ground anymore for man's sake; for the imagination of man's heart is evil from his youth; neither will I again smite anymore every living thing as I have done. While the earth remaineth, seedtime and harvest, and cold and heat, and summer and winter, and day and night shall not cease." *Id.*, 8:21-8:22 "And Noah began to be an husbandman and he planted a vineyard." *Id.*, 9:20.

From these Biblical roots, the right of man to bring forth the fruits of the earth sustained him throughout history. The lowly potato saved Western Europe's remaining population from the Black Death. By the 18th Century, English farmers had settled New England villages. Dutch, German, Swedish, Scotch Irish and English farmers had settled on isolated Middle Colony farmsteads. English and some French farmers had settled on plantations in tidewaters and on isolated Southern Colony farmsteads in Piedmont. The largely agrarian society of the Founding Fathers would not have

existed but for the right to farm. By 1790, 90 percent of the workforce in the United States were farmers. Economic Research Service. (2000, September). *A History of American Agriculture*, 1607-2000. (ERS-POST-12.) Washington, DC: Author, *http: www.agclassroom.org/gan/timeline/farmers.land.htm*

Natural rights are recognized by secular theorists as well. Ayn Rand observed:

> "Whether one believes that man is the product of the Creator or nature, the issue of man's origin does not allow for the fact that he is an entity of a specific kind – a rational being – that he cannot function essentially under coercion, and that rights are a necessary condition of his particular mode of survival." *Rand, Ayn*, "Man's Rights", *Capitalism: The Unknown Ideal*, Penguin Group (USA) Inc., copyright 1946, 1962, 1964, 1965, 1966.

A right-to-farm is such a condition.

In a highly distinguishable case, the Eighth Circuit Court of Appeals considered whether the right to farm marijuana was pursuant to a "tribal ordinance" was a fundamental right. *United States v. Plume*, 447 F.3d 1067(8th Cir. 2006). In that case the Eighth Circuit refused to recognize "farming hemp" as a fundamental right in part because the "[United States] Supreme Court has not declared 'farming' to be a fundamental right." *Id.*, at 1075. Petitioners agree with the Eighth Circuit in that regard, such a decision regarding the right to farm should be considered by the United States Supreme Court.

II. THE SUPREME COURT SHOULD DECIDE WHETHER THE STATE OF NEW JERSEY'S EXERCISE OF ITS POLICE POWERS THROUGH THE ENACTMENT OF ENVIRONMENTAL LEGISLATION IS A TAKING OF PRIVATE PROPERTY WITHOUT PAYMENT OF FAIR AND JUST COMPENSATION PURSUANT TO THE FIFTH AMENDMENT

Specifically at issue is whether the Highlands Act's overlapping development standards, regulatory structure and fictional core, which are intended to prevent development within a 410,000 acre legislatively defined "preservation area" (and ultimately in the entire 1,342 square mile legislatively defined Highlands Region), is a legitimate state purpose for exercise of its police powers in light of its devastating consequences. While preservation of undeveloped land in its natural state can be a public purpose for exercise of the State's rights to obtain property pursuant to its power of eminent domain with payment of fair market value, standing alone it is not a legitimate basis for exercise of the State's police power.

The Supreme Court in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594(1962) quoting *Lawton v. Steel*, 152 U.S. 133, 136(1894) described the implied necessity of the police power as follows:

> "To justify the State in . . . interposing its authority on behalf of the people, it must appear, first, that the interests of the public. . .requires such interference; and second, that

> the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals.

It is also long acknowledged that exercise of police power may result in a diminution of value:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under implied limitation and must yield to the police power." *Pennsylvania Coal Company v. Maylan*, 260 U.S. 393, 415 (1922).

In *Agins v. City of Tiberon*, 447 U.S. 255(1980), the United States Supreme Court established a takings test in the context of a municipal zoning ordinance implementing a state land use legislative delegation of power which enabled the municipality to restrict the development of open space. It is the standard which should be applied to the Highlands Act, which has had its intended affect of preventing any further development of open space in a 410,000 acre legislatively defined "preservation area".

Under the *Agins* test, a court must find either that the law affects the taking "(1) if the Ordinance does not substantially advance a legitimate State interest, or (2) denies an owner economically viable use of his land." 447 U.S. at 261.

The Court should further review this issue since the Highlands Act is an example which may be utilized in the other 49 States to implement eco-socialist property rights principles. The extensive record below demonstrate the adverse societal impacts of the Act and provide the basis for the Court's determination of this issue, critical not only to New Jersey residents impacted by it, but by all citizens who may become subject to preservation statutes and regulations adopted by other States exercising their police powers.

Preservation regulations such as the Highlands Act identify as many environmental resources as possible and subjectively rank their value. Through the re-definition of accepted terms, development standards with arbitrary buffers, prohibition of permits for water supply and sewer service, and an approval process which is an economic futility, preservation regulations cumulatively make development of property a practical impossibility. An example is to include intermittent streams in a definition of open waters so that the Act's 300' buffers apply to intermittent streams.

The Highlands Act's development standards are contained in *N.J.S.A.* 13:20-32. These were subsequently readopted by the NJDEP with an additional standard which the DEP was directed to promulgate:

> "A septic system density standard established at a level to prevent the degradation of water quality, or to require the restoration of water quality, and to protect ecological uses from individual, secondary, and cumulative impacts, in consideration of deep aquifer recharge available for dilution."

The effect of this regulation is to extend the Act's impact beyond the average 75% devaluation by limiting densities to one residential dwelling per 25 acres and 88 acres throughout the preservation zone. This regulation was challenged by the New Jersey Farm Bureau, *In Re Highlands Water Protection and Planning Act Rules, N.J.A.C.* 7:38-1 *et seq.*, Docket No. A-984-05T1. Oral argument had been scheduled but has been extended at the request of the New Jersey Attorney General while the administration of Governor Christopher Christie evaluates the regulation.

The other component of a preservation statute is to impose an extremely expensive and cumbersome administrative approval process in order for a property owner to use their property for something other than legislatively bargained exemptions such as those contained in *N.J.S.A.* 13:20-28. The process under the Highlands Act is a Highlands Preservation Area Approval (HPAA), *N.J.S.A.* 13:20-33. In addition to the extraordinary expenses associated with the process apparent from a facial review of the statutory requirements, an HPAA will only be considered if it does not propose any more than the minimal beneficial use of the land. This minimal beneficial use is further impacted by the requirement that an application comply with all of the developmental standards.

In order for a property owner to pursue a takings claim, the New Jersey Supreme Court has held the administrative hardship waiver remedy of the Highlands Water Protection and Planning Act, *N.J.S.A.* 13:20-33 must be exhausted before a property owner can assert a claim that the Act's restrictions upon development in

the preservation area of the Highlands Region has resulted in a regulatory taking. *OFP, LLC v. State*, 395 N.J. Super. 571(App.Div.2007), 930 A. 2d 442, Judgment aff'd by 197 N.J. 412, 963 A. 2d 810(2009). Plaintiffs were so directed by the Appellate Decision.

Based on the economic futility of the HPAA process and the additional administrative regulations governing the DEP's case by case exercise of discretion to grant waiver of standards to prevent takings, there is no remedy for a takings claim by the State of New Jersey in the State of New Jersey. Pursuant to *N.J.A.C.* 7:38-6.8(g), the DEP will only consider a request for a waiver to avoid a taking of property without just compensation pursuant to *N.J.S.A.*13:20-33(b)after it has rendered a decision on the HPAA. Plaintiffs are also required to demonstrate attempts to sell the development rights through the TDR program and prove that there were no reasonable offers to purchase the property based on the minimal, economically viable use from the project after requesting an offer from a DEP list of environmental organizations.

As is apparent from its governing statute, *N.J.S.A.* 13:20-13, the Highlands T.D.R. Program is illusory and will never be a meaningful source of compensation on the scale of the State's Highlands takings. The failure of the Highlands Council to include areas designated as voluntary receiving zones with a model TDR in place when it adopted a Regional Master Plan is the subject of a pending Appellate challenge. *In Re Adoption of Highlands Regional Master Plan*, Docket No. A-1054-08.

Since the Appellate Division concluded that "shall" means "may" in the context of the failure of an executive agency to exercise a delegated legislative land use power within 18 months, there is no possibility that the complex TDR Program will ever be implemented.

The portions of the Highlands Act annexed as Appendix G, *N.J.S.A. 13:20-13* (TDR Program) Pet. App. 48a – 54a, *N.J.S.A.* 13:20-28 (Exemptions) Pet. App. 55a – 61a, *N.J.S.A.* 13:20-32 (Standards) Pet. App. 61a- 65a and *N.J.S.A.* 13:20-33 (Highlands Permitting) Pet. App. 66a - 69a and the DEP Waiver/Takings process (*N.J.A.C.* 7:38-6.8) Pet. App. 66a -77a provide a blueprint for other States to prevent development of open space as a police power without payment of any compensation. Supreme Court review is required.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DECIDED SEPTEMBER 4, 2009

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4591-07T1

COUNTY OF WARREN, a body politic and corporate of the State of New Jersey,

Plaintiff,

and

DAVID SHOPE, HANK KLUMPP, CHARLES SHOOP, ROBERT BEST, RUTH BEST, ANDREW DRYSDALE, LOIS DRYSDALE, JERRY W. KERN, and SANDRA KERN,

Plaintiffs-Appellants,

v.

STATE OF NEW JERSEY, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL, and NEW JERSEY WATER SUPPLY AUTHORITY,

Defendants-Respondents.

Appendix A

Submitted May 6, 2009 - Decided September 4, 2009

Before Judges Rodriguez, Payne and Waugh.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County,
Docket No. L-1021-07.

WAUGH, J.A.D.

The individual plaintiffs appeal the dismissal of their declaratory judgment action against the State of New Jersey, the Department of Environmental Protection (DEP), the Highlands Water Protection and Planning Council (Council), and the New Jersey Water Supply Authority (Authority)[1] (collectively, defendants). We affirm.

I.

According to the complaint, the individual plaintiffs are New Jersey farmers owning tracts of land, ranging in size from 18 to 150 acres, within the "preservation area" created by the Highlands Water Protection and Planning Act (Highlands Act), *N.J.S.A.* 13:20-1 to -35, which was signed into law in August 2004. Plaintiffs, along with the County of Warren (Warren County), alleged that: (1) the Council's failure to meet the statutory deadlines established by *N.J.S.A.* 13:20-8 for

1. The Authority was added as a defendant in the amended complaint.

the adoption of a master plan frustrated the legislative scheme, such that the Council's decision to extend its time to act should be declared ultra vires (count one); (2) the statutory exemptions established by *N.J.S.A.* 13:20-28 improperly placed the entire burden of development restrictions upon owners of larger parcels of land, unlawfully treating similarly situated property owners differently in violation of the equal protection guarantee inherent in article one, paragraph one of the New Jersey Constitution (count two); (3) the transfer of development rights program to be established under *N.J.S.A.* 13:20-13 is not a viable funding source for the acquisition of exceptional natural resource lands to be protected under the Highlands Act (count three); and (4) the boundaries of the preservation area set forth in *N.J.S.A.* 13:20-7(b) were created without a legitimate scientific basis, and therefore violate the equal protection and due process guarantees of the New Jersey Constitution (count four).

In lieu of an answer, defendants moved to dismiss. The motion judge ultimately granted the motion and dismissed the amended complaint, relying in large part on our opinion in *OFP, L.L.C. v. State*, 395 *N.J. Super.* 571 (App. Div. 2007), *aff'd o.b.*, 197 *N.J.* 418 (2008), which upheld the Highlands Act on due process and other grounds. The judge also dismissed the challenge to the Council's action in extending its time to adopt the master plan for lack of subject matter jurisdiction, finding that the issue was a final decision of a state administrative agency subject only to our direct review pursuant to *Rule* 2:2-3(a)(2). The judge found that there was no legal

merit in plaintiffs' remaining claims. Finally, he denied plaintiffs' cross-motion for leave to file a further amended complaint, which would have added an additional plaintiff and stated a claim pursuant to 42 *U.S.C.A.* § 1983.

Plaintiffs filed a motion for reconsideration. That motion was denied in April 2008, with the resulting order filed on May 15, 2008. This appeal followed. Warren County did not file an appeal and has not participated in the appeal filed by the individual plaintiffs.

II.

On appeal, plaintiffs raise the following issues:

POINT ONE: THE NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL HAS ACTED ULTRA VIRES BECAUSE IT DID NOT ADOPT A MASTER PLAN WITHIN THE STATUTORY MANDATED DEADLINES AND THEREFORE THE ACT MUST BE SET ASIDE.

POINT TWO: THE COURT BELOW ERRED BECAUSE IT DID NOT RECOGNIZE THE RIGHT TO FARM AS A FUNDAMENTAL RIGHT, AND THEREFORE APPLIED THE RATIONAL BASIS STANDARD INSTEAD OF THE STRICT SCRUTINY STANDARD IN CONSIDERING PLAINTIFF-FARMERS' EQUAL PROTECTION RIGHTS.

POINT THREE: EVEN IF THE COURT BELOW APPLIED THE CORRECT STANDARD TO APPELLATE-PLAINTIFFS' EQUAL PROTECTION CHALLENGE TO THE HIGHLANDS ACT, IT SHOULD HAVE FOUND THAT THE ACT VIOLATES THE PLAINTIFF-FARMERS' EQUAL PROTECTION RIGHTS UNDER THE RATIONAL BASIS TEST BECAUSE THE HIGHLANDS ACT IS NOT JUSTIFIED BY AN APPROPRIATE SCIENTIFIC BASIS.

POINT FOUR: THE COURT BELOW ERRED BY NOT FINDING THAT THE STATUTORY EXEMPTIONS TO THE HIGHLANDS ACT VIOLATED THE EQUAL PROTECTION RIGHTS OF FARMERS BY IMPOSING THE MOST STRINGENT DEVELOPMENT RESTRICTIONS ON OWNERS OF LARGE PIECES OF LAND.

POINT FIVE: THE COURT BELOW ERRED BECAUSE IT DID NOT CONSIDER THE EXPERT REPORTS AND OTHER DOCUMENTS THAT WERE MADE PART OF THE RECORD BELOW.

A.

The motion judge dismissed the case on the basis of the defendants' *Rule* 4:6-2 motion, which should generally be granted "in only the rarest of instances."

NCP Litig. Trust v. KPMG LLP, 187 *N.J.* 353, 365 (2006) (quoting *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 *N.J.* 739, 772 (1989)). A motion judge's review of a complaint is to be "undertaken with a generous and hospitable approach," *ibid.* (quoting *Printing Mart-Morristown*, *supra*, 116 *N.J.* at 746), and "the court should assume that the nonmovant's allegations are true and give that party the benefit of all reasonable inferences," *ibid.* (citing *Smith v. SBC Commc'ns Inc.*, 178 *N.J.* 265, 282 (2004)). "If 'the fundament of a cause of action may be gleaned even from an obscure statement of claim,' then the complaint should survive this preliminary stage." *Ibid.* (quoting *Craig v. Suburban Cablevision, Inc.*, 140 *N.J.* 623, 626 (1995)).

Where, however, it is clear that the complaint states no basis for relief and that discovery would not provide one, dismissal of the complaint is appropriate. *Sickles v. Cabot Corp.*, 379 *N.J. Super.* 100, 106 (App. Div.), *certif. denied*, 185 *N.J.* 297 (2005) ("[A] court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief."); *Holmin v. TRW, Inc.*, 330 *N.J. Super.* 30, 32 (App. Div. 2000), *aff'd o.b.*, 167 *N.J.* 205 (2001); *Camden County Energy Recovery Assocs. v. Dep't of Envtl. Prot.*, 320 *N.J. Super.* 59, 64 (App. Div. 1999), *aff'd o.b.*, 170 *N.J.* 246 (2001); Pressler, *Current N.J. Court Rules*, comment 4.1.1 to R. 4:6-2 (2009). "However, a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." *Rieder v. State*, 221 *N.J. Super.* 547, 552 (App. Div. 1987).

Appendix A

If materials "outside the pleadings are considered, the motion is treated as a motion for summary judgment." *Enourato v. New Jersey Bldg. Auth.*, 182 *N.J. Super.* 58, 64-65 (App. Div. 1981) (citing R. 4:6-2). Although the motion judge did not specifically refer to treating the motion as one for summary judgment, he acknowledged that both sides submitted extensive exhibits. In reviewing a motion for summary judgment, a motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 540 (1995). For present purposes, that standard is substantially the same as the standard for a *Rule* 4:6-2 motion.

Because there was no evidentiary hearing, and hence no judicial factfinding in the Law Division, our review of the decision is plenary. *Marshak v. Weser*, 390 *N.J. Super.* 387, 390 (App. Div. 2007).

B.

We turn first to the issue of the validity of the regional master plan. With respect to that issue, there were clearly no factual disputes, so we are dealing with a question of law only.

The Highlands Act created the Highlands Council, *N.J.S.A.* 13:20-4, which was "delegated responsibility

for land use planning in the Highlands Region, consisting of nearly 800,000 acres in eighty-eight municipalities located in parts of Morris, Sussex, Passaic, Bergen, Warren, Hunterdon and Somerset Counties, *N.J.S.A.* 13:20-7(a)." *OFP*, *supra*, 395 *N.J. Super.* at 576. Pursuant to *N.J.S.A.* 13:20-8(a), the Council was required, "within 18 months after the date of its first meeting, and after holding at least five public hearings in various locations in the Highlands Region and at least one public hearing in Trenton, [to] prepare and adopt a regional master plan for the Highlands Region." The Council held its initial organizing meeting on December 16, 2004, consequently it was statutorily required to adopt a regional master plan by June 2006.

In April 2006, the Council adopted Resolution 2006-17, setting forth its schedule for adopting the regional master plan with a target date for adoption in December 2006. The Governor did not veto the Council's action, although he had the authority to do so pursuant to *N.J.S.A.* 13:20-5(j).

On November 30, 2006, the Council adopted its Resolution 2006-30, authorizing the release of a draft regional master plan and providing for January 2007 public hearings on the plan. The comment period was subsequently extended through May 11, 2007. Consequently, the plan had not yet been adopted when plaintiffs filed their initial complaint on April 19, 2007.

By Resolution 2008-27, the Council adopted its final regional master plan on July 17, 2008, and transmitted

it to the Governor and other State entities for review. 40 *N.J.R.* 5852(b) (Oct. 6, 2008). The plan became effective on September 8, 2008. *Ibid.*

Plaintiffs contend that, because the Council was required to adopt a regional master plan within the eighteen-month period following the Council's initial meeting, the Council was powerless to act thereafter without additional authorization from the Legislature and, consequently, its purported actions extending the time for adoption were ultra vires and its subsequent adoption of the regional master plan was void. They cite no cases to support that result.

Plaintiffs correctly observe that the Highlands Act, and particularly *N.J.S.A.* 13:20-8(a), did not grant the Council specific authority to extend the time for adoption of the regional master plan. It does not, however, follow that the Council's failure to act within the time set by the Legislature resulted in the extinguishment of its authority to adopt such a plan. There is nothing in the Highlands Act to suggest that the Legislature intended such a drastic result. We view the eighteen-month period as directory, rather than as a mandatory deadline that would invalidate any subsequent adoption of the plan. *See New Jersey State Hotel-Motel Asso. v. Male*, 105 *N.J. Super.* 174, 177 (App. Div. 1969). *See also Syquia v. Bd. of Educ. of Harpursville Cent. Sch. Dist.*, 606 *N.E.*2d 1387, 1390 (N.Y. 1992) ("[C]ourts have held in various contexts that deadlines imposed by statute will be read as directory rather than mandatory."). That in one

instance involving the State Planning Act, *N.J.S.A.* 52:18A-196 to -207, the Legislature actually extended such a deadline by statute does not alter the result.

C.

We next address plaintiffs' equal protection arguments, which were also not decided on the basis of disputed facts. As previously noted, we have already rejected a due process attack on the constitutionality of the Highlands Act in *OFP*, *supra*, 395 *N.J. Super.* 571.

We start with the well established principles that statutes are presumed to be constitutional and that anyone challenging the constitutionality of a statute bears the burden of establishing its unconstitutionality. *State v. One 1990 Honda Accord*, 154 *N.J.* 373, 377 (1998). In addition, we are obligated to construe a challenged statute to avoid constitutional defects if the statute is "'reasonably susceptible' of such construction." *New Jersey Bd. of Higher Educ. v. Bd. of Dirs. of Shelton College*, 90 *N.J.* 470, 478 (1982) (quoting *State v. Profaci*, 56 *N.J.* 346, 350 (1970)).

In *Brown v. City of Newark*, 113 *N.J.* 565, 573-74 (1989), the Supreme Court set forth the parameters for an equal protection analysis as follows:

> As distinguished from standards governing due process claims, federal equal protection analysis involves different tiers or levels of review. If a fundamental right or

suspect class is involved, the legislative classification is subject to strict scrutiny, *Barone [v. Dept. of Human Servs.]*, 107 *N.J.* [355,] 364-65 [(1987)]; *Greenberg v. Kimmelman*, 99 *N.J.* 552, 564 (1985), which requires that a statute further a compelling state interest and that there be no less restrictive means of accomplishing that objective. *Barone*, *supra*, 107 *N.J.* at 365 (citing *Graham v. Richardson*, 403 *U.S.* 365, 91 *S. Ct.* 1848, 29 *L. Ed.* 2d 534 (1971)). When it regulates a "semi-suspect" class, a legislative act is examined under "intermediate scrutiny," and must be substantially related to the achievement of an important governmental objective. *Barone*, *supra*, 107 *N.J.* at 365 (citing *Craig v. Boren*, 429 *U.S.* 190, 97 *S. Ct.* 451, 50 *L. Ed.* 2d 397 (1976), *reh'g denied*, 429 *U.S.* 1124, 97 *S. Ct.* 1161, 51 *L. Ed.* 2d 574 (1977)). If, as here, the enactment does not affect a suspect or semi-suspect class and does not attempt to regulate a fundamental right, it need be only rationally related to a legitimate state interest to satisfy federal equal protection requirements. *Ibid.* (citing *Dandridge v. Williams*, 397 *U.S.* 471, 90 *S. Ct.* 1153, 25 *L. Ed.* 2d 491, *reh'g denied*, 398 *U.S.* 914, 90 *S. Ct.* 1684, 26 *L. Ed.* 2d 80 (1970)).

When conducting equal protection analysis under article I, paragraph 1 of the New Jersey Constitution, we have rejected a multi-tiered analysis and employed a

> balancing test. *Barone, supra*, 107 *N.J.* at 368; *Greenberg, supra*, 99 *N.J.* at 567; *Right to Choose v. Byrne*, 91 *N.J.* 287, 308-09 (1982). "In striking the balance, we have considered the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." *Greenberg, supra*, 99 *N.J.* at 567. Although stated differently, an equal protection analysis of rights under article I, paragraph 1 of the New Jersey Constitution, like an analysis of equal protection and due process under the fourteenth amendment of the United States Constitution, may lead to the same results. *Id.* at 569.

Plaintiffs assert that the motion judge erred first by applying the "rational basis" test for equal protection purposes rather than the "strict scrutiny" test because he failed to recognize a fundamental right to farm - an argument raised for the first time in their motion for reconsideration. However, they argue that, even if the "rational basis" standard is applicable, the motion judge should have found that the Highlands Act violated their right to equal protection.

In rejecting plaintiffs' argument that farming is a fundamental right under the New Jersey constitution such that a strict scrutiny test must be applied, the motion judge held:

> With regard to the arguments concerning farming being a protected right or a suspect

> classification, the Court has given plaintiffs every opportunity to cite authority that would demonstrate to this Court that farming as an economic activity is a protected right or a suspect classification even though those arguments could have been raised at the time of the original motion and were not raised.
>
> Plaintiffs have not been able to offer the Court any demonstration by way of legal authority that farming activity is such a protected right or economic or suspect classification.
>
> Despite the historical background of farming it's clear to the Court that the economic activity of farming does not fall within those categories.

We agree with that analysis.

Plaintiffs have cited no constitutional provision, statute, or case that specifically articulates a right to farm of constitutional dimension or that recognizes the status of being a farmer or engaging in farming as a protected, suspect or semi-suspect class. In *Gardner v. New Jersey Pinelands Commission*, 125 *N.J.* 193, 220 (1991), although the plaintiff farmer did not argue that he was a member of "a suspect or semi-suspect class" or that farming was a right of constitutional dimension, as the plaintiffs contend here, the Supreme Court held that the "right at issue[, his right and freedom to use

and enjoy his farmland property,[2]] also is not a fundamental right because it involves only plaintiff's ability to use his property in the most profitable or economically-valuable manner, not the right to derive some beneficial use of the property."

That there was, as demonstrated by documents in the record, discussion among State officials in the early 1980s about proposing legislation recognizing such a constitutional right does not support plaintiffs' argument that there is one, particularly when the proposed legislative finding was never enacted.

The draft legislation on which plaintiffs rely was eventually enacted as the Right to Farm Act (RFA), *N.J.S.A.* 4:1C-1 to -10.4. The Legislature set forth the purposes for enactment of the RFA in its legislative findings, *N.J.S.A.* 4:1C-2, as follows:

> a. The retention of agricultural activities would serve the best interest of all citizens of this State by insuring the numerous social, economic and environmental benefits which accrue from one of the largest industries in the Garden State;
>
> b. Several factors have combined to create a situation wherein the regulations of various State agencies and the ordinances of individual municipalities may unnecessarily constrain essential farm practices;

---

2. *Gardner*, *supra*, 125 *N.J.* at 211-12.

c. It is necessary to establish a systematic and continuing effort to examine the effect of governmental regulation on the agricultural industry;

d. All State departments and agencies thereof should encourage the maintenance of agricultural production and a positive agricultural business climate;

e. It is the express intention of this act to establish as the policy of this State the protection of commercial farm operations from nuisance action, where recognized methods and techniques of agricultural production are applied, while, at the same time, acknowledging the need to provide a proper balance among the varied and sometimes conflicting interests of all lawful activities in New Jersey.

The RFA protects commercial farmers by preempting municipal and county land use authority over commercial farms and by shielding them from nuisance suits brought by neighbors. *N.J.S.A.* 4:1C-9, -10; *Twp. of Franklin v. Den Hollander*, 172 *N.J.* 147, 149-50 (2002); *Borough of Closter v. Abram Demaree Homestead, Inc.*, 365 *N.J. Super.* 338, 347-48 (App. Div.), *certif. denied*, 179 *N.J.* 372 (2004). The RFA does not, as was apparently discussed during the early drafting stages, establish, recognize, or make any reference to a constitutionally protected right to farm.

Interestingly, the Highlands Act itself refers to the RFA and sets forth the Legislature's intent to further its purposes through the Highlands Act itself.

> The Legislature further finds and declares that there are approximately 110,000 acres of agricultural lands in active production in the New Jersey Highlands; that these lands are important resources of the State that should be preserved; that the agricultural industry in the region is a vital component of the economy, welfare, and cultural landscape of the Garden State; and, that in order to preserve the agricultural industry in the region, it is necessary and important to recognize and reaffirm the goals, purposes, policies, and provisions of the "Right to Farm Act," . . . ([*N.J.S.A.*] 4:1C-1 et seq.) and the protections afforded to farmers thereby.
>
> [*N.J.S.A.* 13:20-2.]

The Legislature further specified that the Council should act to support the agricultural uses of the area:

> In preparing and implementing the regional master plan or any revision thereto, the council shall ensure that the goals, purposes, policies, and provisions of, and the protections afforded to farmers by, the "Right to Farm Act," . . . ([*N.J.S.A.*] 4:1C-1 et seq.), and any rules or regulations adopted pursuant

> thereto, are recognized and not compromised in any manner.
>
> [*N.J.S.A.* 13:20-9(c).]

However, there is nothing in the Highlands Act to support an assertion that there exists a constitutional right to farm or that farmers are a protected, suspect or semi-suspect class for constitutional, equal protection purposes.

Moreover, the Highlands Act included other provisions that were expressly meant to benefit farmers. *N.J.S.A.* 13:20-3 excludes agriculture and horticulture use and development from the definition of "Major Highlands development," which lists types of development that need a Highlands permit. *N.J.S.A.* 13:20-29(a)(2) provides a means for farms to increase their "agricultural impervious cover" under the supervision of the local soil conservation district. Included among the Council's many powers, duties, and responsibilities, is its direction

> [t]o work with the State Agriculture Development Committee and the Garden State Preservation Trust to establish incentives for any landowner in the Highlands Region seeking to preserve land under the farmland preservation program that would be provided in exchange for the landowner agreeing to permanently restrict the amount of impervious surface and agricultural

> impervious cover on the farm to a maximum of five percent of the total land area of the farm.
>
> [*N.J.S.A.* 13:20-6(w).]

In addition to failing to support their assertion that farming is a constitutionally protected endeavor or that farmers are a protected, suspect or semi-suspect class, the plaintiffs fail to articulate how the Highlands Act impedes their right or ability to farm or engage in the business of farming. In their brief, they make the following assertion in that regard:

> In Appellant's Motion for Reconsideration, the trial court was requested to address the equal protection standards associated with discrimination against farmers as a suspect classification and the related constitutional issue, the right to engage in farming as a livelihood and as a way of life is a fundamental right protected by the Fifth and Fourteenth Amendments to the United States Constitution and Article One of the New Jersey Constitution. By stripping 75% of the equity from their lands, the State of New Jersey through the Highlands Water Protection and Planning Act is depriving farmers and the individual plaintiffs in the preservation area of this right.

That is simply not an articulation of how the Highlands Act prevents plaintiffs from "farming as a livelihood and

as a way of life." *See also Gardner*, *supra*, 125 *N.J.* at 210-16. Indeed, as already noted, the Highlands Act contains provisions that favor rather than disfavor farming.

Like the *Gardner* case, the present case involves only the plaintiffs' "ability to use [their] property in the most profitable or economically-valuable manner, not the right to derive some beneficial use of the property." *Id.* at 220. Additionally, although still in its infancy, a transfer of development rights program (TDR) exists for the Highlands Act pursuant to *N.J.S.A.* 13:20-13. Consequently, just as the *Gardner* plaintiff had "at minimum" a right to Pineland Development Credits, similarly plaintiffs here have, at minimum, the opportunity to participate in the Highlands Act's TDR program.

The exemption provisions about which plaintiffs complain may also inure to their benefit, particularly those provisions allowing construction of a single family dwelling on each lot, any improvement to a single family dwelling including an addition, garage, or shed, and harvesting of forest products in accordance with an approved forest management plan. *N.J.S.A.* 13:20-28(a)(1), (2), (5), (7).

Finally, plaintiffs have the opportunity to seek waivers under the Highlands Act to the extent they consider the Act's impact to constitute a taking of their property. *OFP*, *supra*, 395 *N.J. Super.* at 584-87.

Appendix A

To the extent plaintiffs assert a diminution in the value of their land, which would appear more directly related to their interest in selling or developing their land rather than farming it, they raise the issue of an unconstitutional taking already decided in *OFP*, *supra*, 395 *N.J. Super.* at 580-85.

Plaintiffs further contend that the Highlands Act violates their equal protection rights by imposing the most stringent development restrictions upon owners of large tracts of land in the preservation area, apparently assuming that most such owners are farmers. They assert that those landowners have lost seventy-five percent of the equity in their property, while values for owners of small, fully developed lots that are eligible for Highlands Act exemptions under *N.J.S.A.* 13:20-28 have remained stable or increased. Plaintiffs essentially argue that because their larger tracts of land experience a proportionately greater loss of value from the Highlands Act's development restrictions, the Highlands Act has unfairly targeted larger landowners, such as farmers.

The motion judge, after citing cases referring to a "rational basis" standard for cases involving "economic legislation which does not implicate a fundamental right, a suspect class or a semi-suspect class," held:

> In this case the legislative decision to allow development on larger parcels of land only if consistent with the goals and purposes of the Act is certainly consistent with the

> stated purposes of the Act. That is the protection of the Highland region and its vital natural resources from the consequences of over development.
>
> Additionally the Act permits all owners, whether owners of large or small parcels, to seek the same relief under the Act. The Act also provides all disgruntled owners with administrative remedies.
>
> Based upon the foregoing the Court finds that the defendants are entitled to dismissal of the plaintiffs' equal protection claims in Count II of the complaint.

We agree with his conclusion.

Having determined that there is no constitutionally protected right to farm and that farming is not a protected, suspect or semi-suspect classification, we apply the rational-basis test. *Brown, supra*, 113 *N.J.* at 573. We need discern only a "conceivable rational basis." *Greenberg v. Kimmelman*, 99 *N.J.* 552, 563 (1985). Absent any form of invidious discrimination or suspect classification, "all that the Constitution requires is that the statute be rationally related to the achievement of a legitimate state objective." *Drew Assocs. of NJ, LP v. Travisano*, 122 *N.J.* 249, 264 (1991).

Appendix A

As the Supreme Court held in *New Jersey Restaurant Ass'n, Inc. v. Holderman*, 24 *N.J.* 295, 300 (1957):

> The burden of demonstrating that a statute contravenes the equal protection clause is extremely formidable, as is attested by the long trail of failure. In addition to the strong presumption of constitutionality with which all organic challenges are approached, one who assails a statute on this ground must contend with principles of unusual elasticity. It is easily stated that the classification (1) must not be palpably arbitrary or capricious, and (2) must have a rational basis in relation to the specific objective of the legislation. But the second proposition is qualified by limitations which compound the difficulties of one who assails the legislative decision. Thus it is not enough to demonstrate that the legislative objective might be more fully achieved by another, more expansive classification, for the Legislature may recognize degrees of harm and hit the evil where it is most felt. [(Citations omitted).] The Legislature may thus limit its action upon a decision to proceed cautiously, step by step, or because of practical exigencies, including administrative convenience and expense, [(citations omitted)], or because of "some substantial consideration of public policy or convenience or the service of the general welfare." *De Monaco v. Renton*, 18 *N.J.* 352, 360

> (1955). Hence, it may "stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact." *Dominion Hotel, Inc. v. State of Arizona*, [249 *U.S.* 265, 268, 39 *S. Ct.* 273, 274, 63 *L. Ed.* 597, 598 (1919)].

See also Drew, supra, 122 *N.J.* at 264.

In *Greenberg, supra*, 99 *N.J.* at 570, the Supreme Court upheld the constitutionality of *N.J.S.A.* 52:13D-17.2, which banned immediate family of State officials who resided with the official from employment in casinos. The Court recognized that the statute treated spouses differently from partners of State officials who cohabitated but did not marry. *Greenberg, supra*, 99 *N.J.* at 577. The Court went on to note:

> Although it is arguable that the ban should extend to unmarried persons who live together, the Legislature may address the problem one step at a time. *Williamson v. Lee Optical of Okla.*, [] 348 *U.S.* [483,] 489, 75 *S. Ct.* [461,] 465, 99 *L. Ed.* [563,] 573 [(1955)]. Proper classification for equal protection purposes is not a precise science. With the passage of time and the acquisition of further experience, the Legislature may want to reconsider statutory classifications or restrictions. As long as the classifications do

> not discriminate arbitrarily between persons who are similarly situated, the matter is one of legislative prerogative.
>
> *[Ibid.]*

See also Williamson v. Lee Optical of Okla., 348 *U.S.* 483, 489, 75 *S. Ct.* 461, 465, 99 *L. Ed.* 563, 573 (1955) ("[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.").

The plaintiffs argue that the Highlands Act puts them in an unequal position relative to individuals who are arguably "similarly situated," i.e., owners of relatively small parcels of land, as well as land not in a core area to be protected. As was recognized in *Greenberg*, however, classifications "are not a precious science." The classifications at issue, which are applicable to owners of relatively large parcels of land in a core protection area, are clearly and rationally related to the Legislature's purpose in protecting the Highlands from "fragmented and [] unplanned development" and "the environmental impacts of sprawl development." *N.J.S.A.* 13:20-2. We will not second-guess the Legislature's determination that this is best done by focusing on larger parcels in what it has found to be the most sensitive area of the Highlands.

Appendix A

D.

Plaintiffs argue that count four of their complaint was erroneously dismissed because the Highlands Act's establishment of a Highlands Region with a core preservation zone is "a legal fiction without scientific basis." They assert that the Highlands land area is distinguishable from the hydrogeologic conditions in the Pinelands, where those conditions warranted regulating the land by establishing a preservation area. For present purposes, we will assume that they are correct. However, they ignore the legislative findings, contained in *N.J.S.A.* 13:20-2, that express the Legislature's concerns to protect "other exceptional natural resources such as clean air, contiguous forest lands, wetlands, pristine watersheds, and habitat for fauna and flora," as well as "many sites of historic significance."

As the trial court noted, the *OFP* court addressed a similar argument:

> The stated purposes of the Act are not limited to preserving clean drinking water. The Act's purposes also include protection of the "natural resources of the New Jersey Highlands against the environmental impacts of sprawl development[,] [discouragement of] piecemeal, scattered and inappropriate development, in order to accommodate local and regional growth and economic development in an orderly way . . . [and] maintenance of agricultural production and a positive agricultural business climate[.]"

> *N.J.S.A.* 13:20-2. Consequently, even if it could be shown that a limitation of development of OFP's property would not serve to preserve clean drinking water, such a limitation still could further the other stated purposes of the Act. Moreover, the Legislature was not required to consider the condition of each individual property within the preservation area in establishing its boundaries, because such boundaries are not required to "be formulated with mathematical perfection." *Toms River Affiliates v. Dep't of Envtl. Prot.*, 140 *N.J. Super.* 135, 147-48 (App. Div.), *certif. denied*, 71 *N.J.* 345 (1976).
>
> [*OFP, supra*, 395 *N.J. Super.* at 595-96.]

The Legislature drew boundaries relating to the Act's overall goals for water and natural resource protection in the Highlands area, and any imprecision in creating those boundaries is not for the courts to second-guess. Accordingly, count four of plaintiffs' complaint was properly dismissed.

E.

We have considered plaintiffs' remaining issues in light of the record and the applicable law, and we are satisfied that none of them is of sufficient merit to warrant discussion in a written opinion. *R.* 2:11-3(e)(1)(E).

Appendix A

III.

In summary, for the reasons set forth above, we affirm the dismissal of plaintiffs' declaratory judgment action as a matter of law, finding that there were no disputed issues of fact raised that would require an evidentiary proceeding.

Affirmed.

APPENDIX B — ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION PURSUANT TO R. 4:49-2 OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY FILED MAY 15, 2008

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MERCER COUNTY
DOCKET NO. MER-L-1021-07

Civil Action

COUNTY OF WARREN, DAVID SHOPE, HANK KLUMP, CHARLES SHOOP, ROBERT BEST, RUTH BEST, ANDREW DRYSDALE, LOIS DRYSDALE, JERRY W. KERN & SANDRA KERN,

Plaintiffs,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION & THE NEW JERSEY WATER PROTECTION AND PLANNING COUNCIL,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION PURSUANT TO *R.* 4:49-2

Appendix B

THIS MATTER HAVING BEEN OPENED TO THE COURT by Plaintiffs County of Warren represented by Stephen H. Shaw, Esq. (Hueston McNulty PC) and David Shope, et al represented by John Zaiter, Esq. seeking reconsideration of the court's Order of January 18, 2008 granting Defendants' motion and dismissing the Complaint against all defendants with prejudice for failure to state a claim pursuant to *R*- 4:6-2(e), and denying a cross-motion by all Plaintiffs to amend Count II and Count IV of the Complaint to assert due process and equal protection claims under the federal constitution and to amend Count V of the Complaint to assert civil rights violations pursuant to 28 *U.S.C.* §1983;

And the Court having considered the County's letter-brief dated February 15, 2008 alleging the Court erred by disregarding expert reports and other documents attached to the Complaint; erred in applying a rational basis test to the Highlands Act, *N.J.S.A.* 13:20-1, *et seq.*, because it implicated a fundamental constitutional right, *i.e.*, farming; and erred in denying plaintiffs permission to assert federal claims alleged to be prerequisite to petitioning the United States Supreme Court for review;

And the Court having considered Defendants' March 7, 2008 letter-brief in opposition to the motion filed by Barbara L. Conklin D.A.G. on behalf of Anne Milgram, Attorney General of New Jersey, as well as plaintiff's March 10, 2008 letter and April 4, 2008 letter-memorandum and exhibits;

And the Court having heard oral argument on April 11, 2008;

It is on this 15th Day of May, 2008 hereby ORDERED THAT

1. The Plaintiffs' motion for reconsideration of the Court's January 18, 2008 Order granting Defendants' motion and dismissing the Complaint for failure to state a claim is denied for reasons set forth on the record April 11, 2008; and that

2. The Plaintiffs' motion for reconsideration of the Court's January 18, 2008 Order denying plaintiffs' motion to amend the Complaint is denied for reasons set forth on the record April 11, 2008.

s/ Paul J. Innes
PAUL J. INNES, J.S.C.
PRESIDING JUDGE, CIVIL DIVISION

Oral Argument Held:

x Yes _ No
Date: *April 11*, 2008

Motion Opposed:
x Yes _ No

APPENDIX C — EXCERPTED TRANSCRIPT OF MOTION DATED APRIL 11, 2008

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MERCER COUNTY, NEW JERSEY
DOCKET NO. MER-L-1021-07
A.D. # _____

COUNTY OF WARREN, et al.,

Plaintiffs,

v.

STATE OF NEW JERSEY,

Defendants.

Place: Mercer County Civil
Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: April 11, 2008

TRANSCRIPT
OF
MOTION

BEFORE:

THE HON. PAUL INNES, P.J.Cv.P.

Appendix C

[commencing at page 24]

* * *

THE COURT: All right. Back on January 18th this Court granted the State's motion to dismiss the plaintiff's complaint and entered an order accordingly. That was a — there's a challenge brought by the plaintiffs to the Highlands Water Protection and Planning Act and the Court of course dismissed that complaint back on January 18th. And this is plaintiff's application for reconsideration of that Court's prior order.

Rule 4:49-2 governs motions for reconsideration of an order of final judgment. Reconsideration is granted in the Court's discretion and in the interest of justice. *D'Atria v. D'Atria*, 242 NJ Superior Court Reports 392 (Ch. Div. 1990).

The Rule lists three elements that a motion for reconsideration must satisfy in order to be successful. First, it must be made within 20 days of entry of the order of judgment; second, the motion must state the basis for reconsideration; third, the motion must specify which cases or facts the Court erred in regards to or overlooked. Rule 4:49-2.

In addition our case law requires that [25] "reconsideration be utilized only for those cases which fall into the narrow corridor in which either, one, the Court has expressed its decision based upon a palpably

incorrect or irrational basis; two, it is obvious that the Court either did not consider or failed to appreciate the significance of probative, competent evidence; or, three, if a litigant wishes to bring new or additional information to the Court's attention which it could not have provided on the first application the Court should in the interest of justice and in the exercise of its sound discretion consider the evidence. *Cummings v. Bahr*, 295 NJ Super. 374 (App. Div. 1996).

A motion should be denied if it is based on unraised facts known to the movant prior to the entry of the underlying order. *DelVecchio v. Hemburger*, 388 NJ Superior Court Reports 179 (App. Div. 2006).

With respect to the issues related to this motion the Court finds that its prior decision was not based upon a palpably incorrect or irrational basis. In addition some of the arguments made by plaintiffs were arguments that could have been raised prior and were not.

Even if the reports proffered by the plaintiffs were or are a part of the public record and [26] even taking such reports into consideration with respect to the arguments made in the original motion to dismiss, the Court finds that they are insufficient to overcome the arguments placed upon the record during oral argument by counsel and the decision and reasoning of the Court in rendering its decision.

With respect to the motion to amend the complaint, the Court finds that the parallel Federal constitution —

constitutional issues raised by plaintiff's counsel were properly denied before and that such does not deprive the plaintiff of the opportunity to raise those issues on appeal at the Appellate Division.

With regard to the arguments concerning farming being a protected right or a suspect classification, the Court has given plaintiffs every opportunity to cite authority that would demonstrate to this Court that farming as an economic activity is a protected right or a suspect classification even though those arguments could have been raised at the time of the original motion and were not raised.

Plaintiffs have not been able to offer the Court any demonstration by way of legal authority that farming activity is such a protected right or economic or suspect classification.

[27] Despite the historical background of farming it's clear to the Court that the economic activity of farming does not fall within those categories.

Based upon these factors the Court denies the motion for reconsideration. Thank you all very much.

* * * *

APPENDIX D — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY DISMISSING COMPLAINT DATED AND FILED JANUARY 18, 2008

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY
DOCKET NO. MER-L-1021-07

COUNTY OF WARREN, DAVID SHOPE, HANK KLUMP, CHARLES SHOOP, ROBERT BEST, RUTH BEST, ANDREW DRYSDALE, LOIS DRYSDALE, JERRY W. KERN & SANDRA KERN,

Plaintiffs,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION & THE NEW JERSEY WATER PROTECTION AND PLANNING COUNCIL,

Defendants.

Civil Action

ORDER DISMISSING COMPLAINT

THIS MATTER HAVING BEEN OPENED TO THE COURT by Anne Milgram, Attorney General of New Jersey, attorney for Defendants, by Barbara Conklin, Deputy Attorney General, seeking an Order dismissing the Complaint against all Defendants with prejudice for failure to state a claim pursuant to *R.* 4:6-2(e);

Appendix D

And notice having been given to Plaintiffs' counsel Stephen H. Shaw, Esq. (Hueston Mcnulty, P.C.) and John M. Zaiter, Esq. (Broscious, Fisher and Zaiter);

And the Court having considered Defendants' Brief, Certification of Counsel and Exhibits, Plaintiffs' written opposition; and counsels' oral argument before the Court on January 18, 2008;

And good cause having been shown;

It is hereby ORDERED on this 18th Day of January, 2008 that the Complaint in this matter is hereby dismissed with prejudice for failure to state a claim pursuant to *R.* 4:6-2(e), for the reasons placed on record by the Court on January 18, 2008.*

s/ Paul Innes
PAUL INNES, J.S.C.

Oral Argument Held:

x Yes _ No
Date: 1/18, 2008

Motion Opposed:
x Yes _ No

* *And, it is further ordered that Plaintiffs' Cross Motion to amend the complaint is denied.*

APPENDIX E — EXCERPTED TRANSCRIPT OF MOTION HEARING DATED JANUARY 18, 2008

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MERCER COUNTY, NEW JERSEY
DOCKET NO. MER-L-1021-07
A.D. # _____

COUNTY OF WARREN, et al.,

Plaintiffs,

v.

STATE OF NEW JERSEY, et al.,

Defendants.

Place: Mercer County Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: January 18, 2008

TRANSCRIPT OF MOTION HEARING

BEFORE:

THE HON. PAUL INNS, J.S.C.

Appendix E

[Commencing at page 42]

* * *

THE COURT: Okay. Thank you.

All right. The plaintiffs of the County of Warren and nine individuals who own property in the preservation area as delineated in the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq. The defendants are the State of New Jersey, New Jersey Water Supply Authority and the New Jersey Water Protection and Planning Council; the council.

The plaintiffs have brought this action challenging the Highlands Water Protection and Planning Act on various federal and state constitutional grounds. The defendants have brought this motion to dismiss the complaint pursuant to Rule 4:6-2.

The Highlands Act went into effect on August 10th, 2004. The goals of the Act as set forth in the Act are to protect the State's drinking water and to preserve the State's natural resources, including clean [43] air, forest lands, pristine watersheds, habitats for flora and fauna.

Additionally, the Act is intended to protect historic sites and recreational areas from being fragmented and consumed by "piecemeal, scattered and inappropriate development;" N.J.S.A. 13:20-2.

Appendix E

The provisions of the Act include measures for the protection of the property owners affected by the regulation. The Act permits property owners in the preservation area to extract equity from their property through a variety of mechanisms including exemption from permitting requirements, DEP waiver, permitting requirements, land purchased by Green Acres, Farmland Preservation, or the Garden State Preservation Trust or sale of transferrable development rights; TDRs.

The Act established boundaries for the preservation area and the planning area of the Highlands region. The Act created the council and authorized the council to prepare and adopt a regional master plan, RMP, for the Highland region within 18 months from the date of the council's first meeting and after a minimum of five public hearings; N.J.S.A. 13:2-8a.

The council first met on April the 6th, 2006. At that meeting the council voted to change the [44] schedule for the adoption of the RMP and to adopt a final RMP by the end of 2006.

The council notified the Governor and the Legislature of its decision. The Governor never vetoed the minutes of the meeting of the council. The Act also authorized the Commissioner of the Department of Environmental Protection to establish a permitting program implementing the environmental standards set forth in the Act and others which the commissioner deemed necessary to achieve the goals and purposes of the Act; N.J.S.A. 13:20-30 through 32.

Appendix E

The DEP adopted the Highlands Water Protection and Planning Act rules effective May 9th, 2005. And those rules became effective on December the 4th, 2006.

The plaintiffs filed the instant complaint on July 5th, 2007. In Count 1 the plaintiffs challenged the council's failure to promulgate an RMP within 18 months of the first meeting in accordance with the statute, 13:20-8a, and to implement the TDR Program.

In Count 2 the plaintiffs attack the Act's formulation of exemptions to the permitting requirements on equal protection grounds.

In Count 3 the plaintiffs challenge the failure of the State to provide funding for the TDR [45] Program. And in Count 4 of the plaintiff's complaint that the boundaries of the preservation area as set forth in the Act are arbitrary, capricious and unreasonable and violative of the plaintiffs' equal protection and due process rights under the New Jersey Constitution.

Defendants have filed this motion to dismiss pursuant to Rule 4:6-2. On a motion to dismiss a complaint pursuant to Rule 4:6-2 the Court's inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint; *Printing Mart Morristown v. Sharp Electronics Corporation* 116 N.J. 739 (1989); *Rieder v. Department of Transportation* 221 N.J. Superior Court Reports 547 (App. Div. 1987).

Appendix E

The Court is required to search the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary; *DiCristofaro v. Laurel Grove Memorial Park* 43 N.J. Superior Court Reports 244 (App. Div. 1957).

The Court is not concerned with the ability of the plaintiffs to prove the allegations contained in the complaint at this preliminary stage of litigation. Therefore, plaintiffs are entitled to every reasonable [46] inference of fact; *Independent Dairy Workers Union v. Milk Drivers Local 680* 23 N.J. 85 (1956).

In Count 1 plaintiffs challenge the council's failure to adopt an RMP, and implement a TDR Program within 18 months of the first meeting in contravention of the Act.

The council is a state agency and as such its decisions are reviewable only by the Appellate Division, Rule 2:2-3a(2); *Infinity Broadcasting Corporation v. New Jersey Meadowlands Commission* 187 N.J. 212 (2006).

Therefore, the court grants the defendant's motion to dismiss Count 1 of the complaint.

In Count 2 of the complaint the plaintiffs allege that the exemptions contained in the Act unfairly placed the burden of the development restrictions on owners of larger parcels of land and therefore amount to a violation of the plaintiff's equal protection rights.

Appendix E

In New Jersey the courts employ a flexible approach in considering equal protection arguments; *New Jersey State Bar Association v. State* 387 N.J. Superior Court Reports 24 (App. Div. 2006). The critical issue is whether an appropriate governmental interest is suitably furthered by the differential treatment [47] involved.

The courts are to consider the nature of the affected right, the extent to which the governmental restriction intrudes upon it and the public need for the restriction; *Barone v. Department of Human Services* 107 N.J. 355 (1987).

In the case of economic legislation which does not implicate a fundamental right, a suspect class or a semi-suspect class, the courts apply the test of minimal rational basis scrutiny; *Brown v. City of Newark* 113 N.J. 565 (1989).

Statutes and legislative classification survive equal protection claims if supported by "a conceivable rational basis." As long as there is a just and reasonable connection between the purpose of the legislation and the classification, the legislation is beyond judicial review; *David v. Vesta Company* 45 N.J. 301 (1965).

In this case the legislative decision to allow development on larger parcels of land only if consistent with the goals and purposes of the Act is certainly consistent with the stated purposes of the Act; that is, the protection of the Highlands region and its vital natural resources from the consequences of over-

development. Additionally, the Act permits all [48] owners, whether owners of large or small parcels, to seek the same relief under the Act.

The Act also provides all disgruntled owners with administrative remedies. Based upon the foregoing the Court finds that the defendants are entitled to dismissal of the plaintiffs' equal protection claim in Count 2 of the complaint.

In Count 3 plaintiffs allege that the State's failure to fund the TDR Program created by the Act is a violation of plaintiffs' constitutional rights. The Appellate Division addressed a similar argument against the Act in *OFP, LLC v. State* 395 N.J. Superior Court Reports 571 (App. Div. 2007).

In *OFP* the Court recognized that the TDR Program was market driven and uncertain. But, the Court ruled that even without implementation of a TDR Program the Act survived the challenge that it was a regulatory taking of the owner's property due to the availability of the hardship waiver.

Likewise here, notwithstanding the lack of funding for the TDR the hardship waiver application provided under the Act serves to prevent regulatory takings of the plaintiffs' property.

The Court grants defendant's motion to dismiss Count 3.

[49] Finally, in Count 4 of the complaint the plaintiffs challenge the Act's setting of boundaries as arbitrary, capricious and unreasonable and therefore in violation of the plaintiffs' equal protection and due process rights. Again, this argument was addressed by the Appellate Division in *OFP.*

In rejecting the plaintiff/landowner's challenge to the inclusion of its property within the Act's preservation zone, the Court held that the Legislature was not required to consider the condition of each individual property within the preservation area in establishing its boundaries because the boundaries are not required to be formulated with mathematical perfection; *OFP* at 596; quoting *Toms River Affiliates v. DEP* 140 N.J. Superior Court Reports 135 (App. Div.) *certif. denied* 71 N.J. 345 (1976).

The Legislature did in fact base its decision on a number of sources, including the United States Forest Service, the Highlands Task Force, New Jersey Water Supply Authority and Rutgers University.

As stated earlier, the provisions of the Act including the boundaries of the preservation area are rationally related to the purposes and goals of the Act.

And for these reasons the Court grants the [50] defendant's motion to dismiss Count 4 of the complaint.

Now, as a consequence of having found there's no constitutional deprivations here, I'm also going to deny

the plaintiffs' application to amend the complaint. I understand that the amended complaint would also seek to raise some federal constitutional challenges, but I think that the constitutional challenges under the federal and state constitutions here would be so similar that a finding by this court that there's no basis for the complaint under the state constitutional grounds suffice for the Court to rule that the application to amend the complaint should also be denied at this juncture.

Thank you very much. We're in recess.

* * * *

APPENDIX F — ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION DATED JANUARY 12, 2010 AND FILED JANUARY 14, 2010

SUPREME COURT OF NEW JERSEY
C-490 September Term 2009
064879

COUNTY OF WARREN, ETC., ET AL.,

PLAINTIFFS,

AND

DAVID SHOPE, AN ADULT INDIVIDUAL, ET AL.,

PLAINTIFFS-PETITIONERS,

V.

THE STATE OF NEW JERSEY, THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.

DEFENDANTS-RESPONDENTS.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-004591-07 having been submitted to this Court, and the Court having considered the same;

Appendix F

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Virginia A. Long, Presiding Justice, at Trenton, this 12th day of January, 2010.

s/ [illegible]
CLERK OF THE SUPREME COURT

APPENDIX G — RELEVANT STATUTES

TITLE 13 CONSERVATION AND DEVELOPMENT— PARKS AND RESERVATIONS

13:20-13 Use of regional master plan elements for TDR program.

13. a. The council shall use the regional master plan elements prepared pursuant to sections 11 and 12 of this act, including the resource assessment and the smart growth component, to establish a transfer of development rights program for the Highlands Region that furthers the goals of the regional master plan. The transfer of development rights program shall be consistent with the "State Transfer of Development Rights Act," P.L.2004, c.2 (C.40:55D-137 et seq.) or any applicable transfer of development rights program created otherwise by law, except as otherwise provided in this section.

b. In consultation with municipal, county, and State entities, the council shall, within 18 months after the date of enactment of this act, and from time to time thereafter as may be appropriate, identify areas within the preservation area that are appropriate as sending zones pursuant to P.L.2004, c.2 (C.40:55D-137 et seq.).

c. In consultation with municipal, county, and State entities, the council shall, within 18 months after the date of enactment of this act, and from time to time thereafter as may be appropriate, identify areas within the planning area that are appropriate for development as voluntary receiving zones pursuant to P.L.2004, c.2

(C.40:55D-137 et seq.) considering the information gathered pursuant to sections 11 and 12 of this act, including but not limited to the information gathered on the transfer of development rights pursuant to paragraph (6) of subsection a. of section 11 of this act. For the purposes of the council establishing a transfer of development rights program prior to the preparation of the initial regional master plan, the council in identifying areas appropriate for development as voluntary receiving zones shall consider such information as may be gathered pursuant to sections 11 and 12 of this act and as may be available at the time, but the council need not delay the creation of the transfer of development rights program until the initial regional master plan has been prepared. The council shall set a goal of identifying areas within the planning area that are appropriate for development as voluntary receiving zones that, combined together, constitute four percent of the land area of the planning area, to the extent that the goal is compatible with the amount and type of human development and activity that would not compromise the integrity of the ecosystem of the planning area.

d. The council shall work with municipalities and the State Planning Commission to identify centers, designated by the State Planning Commission, as voluntary receiving zones for the transfer of development rights program.

e. In consultation with municipal, county, and State entities, the council shall assist municipalities or counties in analyzing voluntary receiving zone capacity.

f. In consultation with municipal, county, and State entities, the council shall work with municipalities outside of the preservation area to assist these municipalities in developing ordinances necessary to implement the transfer of development rights. The council shall also establish advisory or model ordinances and other information for this purpose.

The council shall make assistance available to municipalities that desire to create additional sending zones on any lands within their boundaries which lie within the planning area and are designated for conservation in the regional master plan.

g. Notwithstanding the provisions of P.L.2004, c.2 (C.40:55D-137 et seq.) to the contrary, the council shall perform the real estate analysis for the Highlands Region that is required to be performed by a municipality prior to the adoption or amendment of any development transfer ordinance pursuant to P.L.2004, c.2.

h. (1) The council shall set the initial value of a development right. The Office of Green Acres in the Department of Environmental Protection and the State Agriculture Development Committee shall provide support and technical assistance to the council in the operation of the transfer of development rights program. The council shall establish the initial value of a development right considering the Department of Environmental Protection rules and regulations in effect the day before the date of enactment of this act.

Appendix G

, The council shall give priority consideration for inclusion in a transfer of development rights program any lands that comprise a major Highlands development that would have qualified for an exemption pursuant to paragraph (3) of subsection a. of section 30 of this act but for the lack of a necessary State permit as specified in subparagraph (b) or (c), as appropriate, of paragraph (3) of subsection a. of section 30 of this act, and for which an application for such a permit had been submitted to the Department of Environmental Protection and deemed by the department to be complete for review on or before March 29, 2004.

i. (1) The council may use the State Transfer of Development Rights Bank established pursuant to section 3 of P.L.1993, c.339 (C.4:1C-51) for the purposes of facilitating the transfer of development potential in accordance with this section and the regional master plan. The council may also establish a development transfer bank for such purposes.

(2) At the request of the council, the Department of Banking and Insurance, the State Transfer of Developments Right Bank, the State Agriculture Development Committee, and the Pinelands Development Credit Bank shall provide technical assistance to the council in establishing and operating a development transfer bank as authorized pursuant to paragraph (1) of this subsection.

(3) Any bank established by the council shall operate in accordance with provisions of general law authorizing the creation of development transfer banks by municipalities and counties.

j. The Office of Smart Growth shall review and coordinate State infrastructure capital investment, community development and financial assistance in the planning area in furtherance of the regional master plan. Prior to the council establishing its transfer of development rights program, the Office of Smart Growth shall establish a transfer of development rights pilot program that includes Highlands Region municipalities.

k. Any municipality in the planning area whose municipal master plan and development regulations have been approved by the council to be in conformance with the regional master plan in accordance with section 14 or 15 of this act, and that amends its development regulations to accommodate voluntary receiving zones within its boundaries which are identified pursuant to subsection c. of this section and which provide for a minimum residential density of five dwelling units per acre, shall, for those receiving zones, be: eligible for an enhanced planning grant from the council of up to $250,000; eligible for a grant to reimburse the reasonable costs of amending the municipal development regulations; authorized to impose impact fees in accordance with subsection m. of this section; entitled to legal representation pursuant to section 22 of this act; accorded priority status in the Highlands Region for any State capital or infrastructure programs; and

eligible for any other appropriate assistance, incentives, or benefits provided pursuant to section 18 of this act.

l. Any municipality located outside of the Highlands Region in any county that has a municipality in the Highlands Region that has received plan endorsement by the State Planning Commission pursuant to the "State Planning Act," P.L.1985, c.398 (C.52:18A-196 et al.), that establishes a receiving zone which provides for a minimum residential density of five dwelling units per acre for the transfer of development rights from a sending zone in the Highlands Region, and that accepts that transfer of development rights shall, for those receiving zones, be eligible for the same grants, authority, and other assistance, incentives, and benefits as provided to municipalities in the planning area pursuant to subsection k. of this section except for legal representation as provided pursuant to section 22 of this act and priority status in the Highlands Region for any State capital or infrastructure programs.

m. (1) A municipality that is authorized to impose impact fees under subsection k. of this section shall exercise that authority by ordinance.

(2) Any impact fee ordinance adopted pursuant to this subsection shall include detailed standards and guidelines regarding: (a) the definition of a service unit, including specific measures of consumption, use, generation or discharge attributable to particular land uses, densities and characteristics of development; and (b) the specific purposes for which the impact fee revenues may be expended.

(3) An impact fee ordinance shall also include a delineation of service areas for each capital improvement whose upgrading or expansion is to be funded out of impact fee revenues, a fee schedule which clearly sets forth the amount of the fee to be charged for each service unit, and a payment schedule.

(4) An impact fee may be imposed by a municipality pursuant to this subsection in order to generate revenue for funding or recouping the costs of new capital improvements or facility expansions necessitated by new development, to be paid by the developer as defined pursuant to section 3.1 of P.L.1975, c.291 (C.40:55D-4). Improvements and expansions for which an impact fee is to be imposed shall bear a reasonable relationship to needs created by the new development, but in no case shall an impact fee assessed pursuant to this subsection exceed $15,000 per dwelling unit unless and until impact fees are otherwise established by law at which time the impact fee shall be 200% of the calculated impact fee.

(5) No impact fee shall be assessed pursuant to this subsection against any low or moderate income housing unit within an inclusionary development as defined under P1.1985, c.222 (C.52:27D-301 et al.).

No impact fee authorized under this subsection shall include a contribution for any transportation improvement necessitated by a new development in a county which is covered by a transportation development district created pursuant to the "New Jersey Transportation Development District Act of 1989," P.L.1989, c.100 (C.27:1C-1 et al.).

Appendix G

13:20-28 Exemptions.

30. a. The following are exempt from the provisions of this act, the regional master plan, any rules or regulations adopted by the Department of Environmental Protection pursuant to this act, or any amendments to a master plan, development regulations, or other regulations adopted by a local government unit to specifically conform them with the regional master plan:

(1) the construction of a single family dwelling, for an individual's own use or the use of an immediate family member, on a lot owned by the individual on the date of enactment of this act or on a lot for which the individual has on or before May 17, 2004 entered into a binding contract of sale to purchase that lot;

(2) the construction of a single family dwelling on a lot in existence on the date of enactment of this act, provided that the construction does not result in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more;

(3) a major Highlands development that received on or before March 29, 2004:

(a) one of the following approvals pursuant to the "Municipal Land Use Law," P.L.1975, c.291 (C.40:55D-1 et seq.):

(i) preliminary or final site plan approval;

(ii) final municipal building or construction permit;

(iii) minor subdivision approval where no subsequent site plan approval is required;

(iv) final subdivision approval where no subsequent site plan approval is required; or

(v) preliminary subdivision approval where no subsequent site plan approval is required; and

(b) at least one of the following permits from the Department of Environmental Protection, if applicable to the proposed major Highlands development:

(i) a permit or certification pursuant to the "Water Supply Management Act," P.L.1981, c.262 (C.58:1A-1 et seq.);

(ii) a water extension permit or other approval or authorization pursuant to the "Safe Drinking Water Act," P.L.1977, c.224 (C.58:12A-1 et seq.);

(iii) a certification or other approval or authorization issued pursuant to the "The Realty Improvement Sewerage and Facilities Act (1954)," P.L.1954, c.199 (C.58:11-23 et seq.); or

(iv) a treatment works approval pursuant to the "Water Pollution Control Act," P.L.1977, c.74 (C.58:10A-1 et seq.); or

(c) one of the following permits from the Department of Environmental Protection, if applicable to the proposed major Highlands development, and if the proposed major Highlands development does not require one of the permits listed in subsubparagraphs (i) through (iv) of subparagraph (b) of this paragraph:

(i) a permit or other approval or authorization issued pursuant to the "Freshwater Wetlands Protection Act," P.L.1987, c.156 (C.13:9B-1 et seq.); or

(ii) a permit or other approval or authorization issued pursuant to the "Flood Hazard Area Control Act," P.L.1962, c.19 (C.58:16A-50 et seq.).

The exemption provided in this paragraph shall apply only to the land area and the scope of the major Highlands development addressed by the qualifying approvals pursuant to subparagraphs (a) and (b), or (c) if applicable, of this paragraph, shall expire if any of those qualifying approvals expire, and shall expire if construction beyond site preparation does not commence within three years after the date of enactment of this act;

(4) the reconstruction of any building or structure for any reason within 125% of the footprint of the lawfully existing impervious surfaces on the site, provided that the reconstruction does not increase the lawfully existing impervious surface by one-quarter acre or more. This exemption shall not apply to the reconstruction of any agricultural or horticultural building or structure for a non-agricultural or non-horticultural use;

(5) any improvement to a single family dwelling in existence on the date of enactment of this act, including but not limited to an addition, garage, shed, driveway, porch, deck, patio, swimming pool, or septic system;

(6) any improvement, for non-residential purposes, to a place of worship owned by a nonprofit entity, society or association, or association organized primarily for religious purposes, or a public or private school, or a hospital, in existence on the date of enactment of this act, including but not limited to new structures, an addition to an existing building or structure, a site improvement, or a sanitary facility;

(7) an activity conducted in accordance with an approved woodland management plan pursuant to section 3 of P.L.1964, c.48 (C.54:4-23.3) or a forest stewardship plan approved pursuant to section 3 of P.L.2009, c.256 (C.13:1L-31), or the normal harvesting of forest products in accordance with a forest management plan or forest stewardship plan approved by the State Forester;

(8) the construction or extension of trails with non-impervious surfaces on publicly owned lands or on privately owned lands where a conservation or recreational use easement has been established;

(9) the routine maintenance and operations, rehabilitation, preservation, reconstruction, or repair of transportation or infrastructure systems by a State entity or local government unit, provided that the activity is consistent with the goals and purposes of this act and does not result in the construction of any new through-capacity travel lanes;

(10) the construction of transportation safety projects and bicycle and pedestrian facilities by a State entity or local government unit, provided that the activity does not result in the construction of any new through-capacity travel lanes;

(11) the routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of this act;

(12) the reactivation of rail lines and rail beds existing on the date of enactment of this act;

(13) the construction of a public infrastructure project approved by public referendum prior to January 1, 2005 or a capital project approved by public referendum prior to January 1, 2005;

(14) the mining, quarrying, or production of ready mix concrete, bituminous concrete, or Class B recycling materials occurring or which are permitted to occur on any mine, mine site, or construction materials facility existing on June 7, 2004;

(15) the remediation of any contaminated site pursuant to P.L.1993, c.139 (C.58:10B-1 et seq.);

(16) any lands of a federal military installation existing on the date of enactment of this act that lie within the Highlands Region; and

(17) a major Highlands development located within an area designated as Planning Area 1 (Metropolitan), or Planning Area 2 (Suburban), as designated pursuant to P.L.1985, c.398 (C.52:18A-196 et seq.) as of March 29, 2004, that on or before March 29, 2004 has been the subject of a settlement agreement and stipulation of dismissal filed in the Superior Court, or a builder's remedy issued by the Superior Court, to satisfy the constitutional requirement to provide for the fulfillment of the fair share obligation of the municipality in which the development is located. The exemption provided pursuant to this paragraph shall expire if construction beyond site preparation does not commence within three years after receiving all final approvals required pursuant to the "Municipal Land Use Law," P.L.1975, c.291 (C.40:55D-1 et seq.).

b. The exemptions provided in subsection a. of this section shall not be construed to alter or obviate the

requirements of any other applicable State or local laws, rules, regulations, development regulations, or ordinances.

c. Nothing in this act shall be construed to alter the funding allocation formulas established pursuant to the "Garden State Preservation Trust Act," P.L.1999, c.152 (C.13:8C-1 et seq.).

d. Nothing in this act shall be construed to repeal, reduce, or otherwise modify the obligation of counties, municipalities, and other municipal and public agencies of the State to pay property taxes on lands used for the purpose and for the protection of a public water supply, without regard to any buildings or other improvements thereon, pursuant to R.S.54:4-3.3.

13:20-32 Rules, regulations, standards.

34. The Department of Environmental Protection shall prepare rules and regulations establishing the environmental standards for the preservation area upon which the regional master plan adopted by the council and the Highlands permitting review program administered by the department pursuant to this act shall be based. These rules and regulations shall provide for at least the following:

a. a prohibition on major Highlands development within 300 feet of any Highlands open waters, and the establishment of a 300-foot buffer adjacent to all Highlands open waters; provided, however, that this

buffer shall not extend into the planning area. For the purposes of this subsection, major Highlands development does not include linear development for infrastructure, utilities, and the rights-of-way therefor, provided that there is no other feasible alternative, as determined by the department, for the linear development outside of the buffer. Structures or land uses in the buffer existing on the date of enactment of this act may remain, provided that the area of disturbance shall not be increased. This subsection shall not be construed to limit any authority of the department to establish buffers of any size or any other protections for category one waters designated by the department pursuant to the "Water Pollution Control Act," P.L.1977, c.74 (C.58:10A-1 et seq.), or any other law, or any rule or regulation adopted pursuant thereto, for major Highlands development or for other development that does not qualify as major Highlands development;

b. measures to ensure that existing water quality shall be maintained, restored, or enhanced, as required pursuant to the "Water Pollution Control Act," P.L.1977, c.74 (C.58:10A-1 et seq.) or the "Water Quality Planning Act," P.L.1977, c.75 (C.58:11A-1 et seq.), or any rule or regulation adopted pursuant thereto, in all Highlands open waters and waters of the Highlands, and to provide that any new or expanded point source discharge, except discharges from water supply facilities, shall not degrade existing water quality. In the case of water supply facilities, all reasonable measures shall be taken to eliminate or minimize water quality impacts;

c. notwithstanding the provisions of section 23 of P.L.1987, c.156 (C.13:9B-23), or any rule or regulation adopted pursuant thereto, to the contrary, the criteria for the type of activity or activities eligible for the use of a general permit for any portion of an activity located within a freshwater wetland or freshwater wetland transition area located in the preservation area, provided that these criteria are at least as protective as those provided in section 23 of P.L.1987, c.156 (C.13:9B-23);

d. notwithstanding the provisions of subsection a. of section 5 of P.L.1981, c.262 (C.58:1A-5), or any rule or regulation adopted pursuant thereto, to the contrary, a system for the regulation of any diversion of more than 50,000 gallons per day, and multiple diversions by the same or related entities for the same or related projects or developments of more than 50,000 gallons per day, of waters of the Highlands pursuant to the "Water Supply Management Act," P.L.1981, c.262 (C.58:1A-1 et seq.), and any permit issued pursuant thereto shall be based on consideration of individual and cumulative impacts of multiple diversions, maintenance of stream base flows, minimization of depletive use, maintenance of existing water quality, and protection of ecological uses. Any new or increased diversion for nonpotable purposes that is more than 50% consumptive shall require an equivalent reduction in water demand within the same subdrainage area through such means as groundwater recharge of stormwater or reuse. Existing unused allocation or allocations used for nonpotable purposes may be revoked by the department where measures to the

maximum extent practicable are not implemented to reduce demand. All new or increased diversions shall be required to implement water conservation measures to the maximum extent practicable;

e. a septic system density standard established at a level to prevent the degradation of water quality, or to require the restoration of water quality, and to protect ecological uses from individual, secondary, and cumulative impacts, in consideration of deep aquifer recharge available for dilution;

f. a zero net fill requirement for flood hazard areas pursuant to the "Flood Hazard Area Control Act," P.L.1962, c.19 (C.58:16A-50 et seq.);

g. the antidegradation provisions of the surface water quality standards and the stormwater regulations applicable to category one waters to be applied to Highlands open waters;

h. a prohibition on impervious surfaces of greater than three percent of the land area, except that Highlands open waters shall not be included in the calculation of that land area;

i. notwithstanding the provisions of the "Safe Drinking Water Act," P.L.1977, c.224 (C.58:12A-1 et seq.), or any rule or regulation adopted pursuant thereto, to the contrary, a limitation or prohibition on the construction of new public water systems or the extension of existing public water systems to serve

development in the preservation area, except in the case of a demonstrated need to protect public health and safety;

j. a prohibition on development, except linear development for infrastructure, utilities, and the rights-of-way therefor, provided that no other feasible alternative, as determined by the department, exists for the linear development, on steep slopes in the preservation area with a grade of 20% or greater, and standards for development on slopes in the preservation area exhibiting a grade of between 10% and 20%. The standards shall assure that developments on slopes exhibiting a grade of between 10% and 20% preserve and protect steep slopes from the negative consequences of development on the site and the cumulative impact in the Highlands Region. The standards shall be developed to prevent soil erosion and sedimentation, protect water quality, prevent stormwater runoff, protect threatened and endangered animal and plant species sites and designated habitats, provide for minimal practicable degradation of unique or irreplaceable land types, historical or archeological areas, and existing scenic attributes at the site and within the surrounding area, protect upland forest, and restrict impervious surface; and shall take into consideration differing soil types, soil erodability, topography, hydrology, geology, and vegetation types; and

k. a prohibition on development that disturbs upland forested areas, in order to prevent soil erosion

and sedimentation, protect water quality, prevent stormwater runoff, and protect threatened and endangered animal and plant species sites and designated habitats; and standards to protect upland forested areas that require all appropriate measures be taken to avoid impacts or disturbance to upland forested areas, and where avoidance is not possible that all appropriate measures have been taken to minimize and mitigate impacts to upland forested areas and to prevent soil erosion and sedimentation, protect water quality, prevent stormwater runoff, and protect threatened and endangered animal and plant species sites and designated habitats.

13:20-33 Highlands permitting review program.

35. a. The Department of Environmental Protection shall establish a Highlands permitting review program to provide for the coordinated review of any major Highlands development in the preservation area based upon the rules and regulations adopted by the department pursuant to sections 33 and 34 of this act. The Highlands permitting review program established pursuant to this section shall consolidate the related aspects of other regulatory programs which may include, but need not be limited to, the "Freshwater Wetlands Protection Act," P.L.1987, c.156 (C.13:9B-1 et seq.), "The Endangered and Nongame Species Conservation Act," P.L.1973, c.309 (C.23:2A-1 et seq.), the "Water Supply Management Act," P.L.1981, c.262 (C.58:1A-1 et seq.), the "Water Pollution Control Act," P.L.1977, c.74 (C.58:10A-1 et seq.), "The Realty

Improvement Sewerage and Facilities Act (1954)," P.L.1954, c.199 (C.58:11-23 et seq.), the "Water Quality Planning Act," P.L.1977, c.75 (C.58:11A-1 et seq.), the "Safe Drinking Water Act," P.L.1977, c.224 (C.58:12A-1 et seq.), the "Flood Hazard Area Control Act," P.L.1962, c.19 (C.58:.16A-50 et seq.), and any rules and regulations adopted pursuant thereto, and the rules and regulations adopted pursuant to sections 33 and 34 of this act. For the purposes of this section, the provisions of P.L.1975, c.232 (C.13:1D-29 et seq.) shall not apply to an application for a permit pursuant to the "Flood Hazard Area Control Act," P.L.1962, c.19 (C.58:16A-50 et seq.).

b. The Highlands permitting review program established pursuant to this section shall include:

(1) a provision that may allow for a waiver of any provision of a Highlands permitting review on a case-by-case basis if determined to be necessary by the department in order to protect public health and safety;

(2) a provision that may allow for a waiver of any provision of a Highlands permitting review on a case-by-case basis for redevelopment in certain previously developed areas in the preservation area identified by the council pursuant to subsection b. of section 9 or subparagraph (h) of paragraph (6) of subsection a. of section 11 of this act; and

(3) a provision that may allow for a waiver of any provision of the Highlands permitting review on a case-by-case basis in order to avoid the taking of property without just compensation.

The grant of a waiver pursuant to this subsection by the department shall be conditioned upon the department's determination that the major Highlands development meets the requirements prescribed for a finding as listed in subsection a. of section 36 of this act to the maximum extent possible.

c. The waiver provisions of subsection b. of this section are limited to the provisions of the rules and regulations adopted pursuant to section 34 of this act, and shall not limit the department's jurisdiction or authority pursuant to any other provision of law, or any rule or regulation adopted pursuant thereto, that is incorporated into the Highlands permitting review program.

d. The Highlands permitting review program established pursuant to this section may provide for the issuance of a general permit, provided that the department adopts rules and regulations which identify the activities subject to general permit review and establish the criteria for the approval or disapproval of a general permit.

e. Any person proposing to construct or cause to be constructed, or to undertake or cause to be undertaken, as the case may be, a major Highlands development in the preservation area shall file an application for a Highlands permitting review with the department, on forms and in a manner prescribed by the department.

f. The department shall, in accordance with a fee schedule adopted as a rule or regulation, establish and charge reasonable fees necessary to meet the administrative costs of the department associated with the processing, review, and enforcement of any application for a Highlands permitting review. These fees shall be deposited in the "Environmental Services Fund," established pursuant to section 5 of P.L.1975, c.232 (C.13:1D-33), and kept separate and apart from all other State receipts and appropriated only as provided herein. There shall be appropriated annually to the department revenue from that fund sufficient to defray in full the costs incurred in the processing, review, and enforcement of applications for Highlands permitting reviews.

N.J.A.C. § 7:38-6.8 Waiver to avoid the taking of property without just compensation

(a) In accordance with N.J.S.A. 13:20-33b, the Department may, on a case by case basis, waive any requirement for an HPAA if necessary to avoid the taking of property without just compensation.

(b) A waiver under this section shall apply only after the Department determines that the proposed development does not meet all the requirements in this chapter as strictly applied, all the applicant's administrative and legal challenges to that determination as set forth in (b)1 below have concluded, and the HPAA applicant meets the requirements in (g) below.

Appendix G

1. An applicant may challenge any Department HPAA decision under the rules as strictly applied if the applicant disputes the Department's findings of facts or application of the rules to those facts. Following an administrative hearing, the Commissioner shall issue a Final Decision approving or denying a HPAA under the rules as strictly applied. The applicant may appeal a Final Decision which denies the HPAA or approves it with conditions to the Appellate Division of Superior Court. If a court finds that the applicant is not entitled to an HPAA under the rules as strictly applied, the Department shall review and decide the applicant's request for a waiver to avoid a taking of property. The applicant may challenge the Department's final agency action on the waiver application after any hearing in the OAL.

(c) In determining whether to waive any requirement of this chapter to avoid an alleged taking of property without just compensation, the Department shall consider:

1. The investments the property owner made in the property as a whole on which regulated activities are proposed and whether the investments were reasonable, in accordance with (d) below;

2. The minimum viable and economically beneficial use of the property as a whole, in accordance with (e) below; and

3. The environmental impacts of the minimum viable and economically beneficial use for the property as a whole, and the consistency of these impacts with the goals of the Highlands Act, in accordance with (f) below.

(d) In determining whether the property owner's investments in the property as a whole were reasonable, the Department shall consider:

1. Conditions at the time of the investment. That is, the investment shall have been made in pursuit of development that would likely have been legally and practically possible on the property as a whole, considering all constraints existing and reasonably ascertainable at the time of the investment. For example, if a property owner bought property containing freshwater wetlands regulated under *N.J.A.C. 7:7A*, it would not be reasonable for that owner to assume that the property could be developed without constraints. In determining conditions at the time of the investment, the Department shall consider, at a minimum, the following:

i. Existing zoning and other regulatory requirements and conditions;

ii. Historic landmarks or other historic or cultural resources on the property that would be adversely impacted by the proposed development;

iii. The likelihood the proposed development could obtain other necessary approvals such as wastewater treatment approvals or approvals from other local, State or Federal agencies;

iv. Terrain and other site conditions, and/or environmental constraints, which could affect the potential uses of the property as a whole;

v. The existence of, or likelihood of obtaining, services to the property such as sewers or electricity; and

vi. Compatibility with and adverse effects upon land uses located on adjacent properties and in the area where the property is located;

2. Costs actually incurred by the property owner in pursuit of development of the property as a whole that were reasonable in amount, related to the development, and unavoidable. For example, if the property owner began construction without the necessary permits or approvals, the owner's costs defending a prosecution or enforcement action for this violation or the payment of fines and penalties would not constitute reasonable investment costs; and

3. Any other factor affecting the property or the property owner, which is related to the reasonableness of the investments claimed and/or the proposed use of the property.

(e) In assessing the minimum beneficial economically viable use of the property as a whole, a use shall not be excluded from consideration merely because it does not result in a profit, reduces the marketability of the property as a whole, or does not allow the property owner to recoup all investments identified under (c) above.

(f) In determining the environmental impacts of the minimum beneficial economically viable use of the property as a whole and the consistency of those impacts with the goals of the Highlands Act under (c) above, the Department shall evaluate whether the use would, to the maximum extent possible:

1. Have a de minimis impact on water resources and would not cause or contribute to a significant degradation of surface or groundwaters. In making this determination, the Department shall consider the extent of any impacts on water resources resulting from the proposed major Highlands development, including, but not limited to, the regenerative capacity of aquifers or other surface or groundwater supplies, increases in stormwater generated, increases in impervious surface, increases in stormwater pollutant loading, changes in land use and changes in vegetative cover;

2. Cause the minimum feasible interference with the natural functioning of animal, plant, and other natural resources at the site and within the surrounding area, and the minimum feasible individual and cumulative adverse impacts to the environment both

onsite and offsite of the proposed major Highlands development;

3. Result in the minimum feasible alteration or impairment of the aquatic ecosystem including existing contours, vegetation, fish and wildlife resources, and aquatic circulation of a freshwater wetland;

4. Not jeopardize the continued existence of species listed pursuant to the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq. or the Endangered Plant Species List Act, N.J.S.A. 13:1B-15.151 et seq., or which appear on the Federal endangered or threatened species list, and will not result in the likelihood of the destruction or adverse modification of habitat for any rare, threatened or endangered species of animal or plant;

5. Not be located or constructed so as to endanger human life or property or otherwise impair public health, safety or welfare;

6. Result in the minimum practicable degradation of unique or irreplaceable land types, historical or archeological areas, and existing public scenic attributes at the site and within the surrounding area; and

7. Meet all other applicable Department standards, rules, and regulations and State and Federal laws.

(g) An applicant for an HPAA may request that the Department waive a requirement of this chapter under

(a) above only after the Department has rendered a decision on an HPAA application under the rules as strictly applied, all legal challenges to the decision that the applicant chooses to bring have concluded pursuant to (b)1, above, and the applicant satisfactorily demonstrates the following to the Department:

1. No alternative to the proposed major Highlands development exists;

2. That the applicant has made a good faith effort to transfer development rights for the subject site pursuant to N.J.S.A. 13:20-13, and has not obtained a commitment from the Highlands Council or a receiving zone municipality to purchase said development rights;

3. The property has been offered for sale at an amount no greater than the specific fair market value to all property owners within 200 feet of the property as a whole, and to the land conservancies, environmental organizations, and the Highlands Council and all other government agencies on a list provided by the Department, at an amount determined in compliance with N.J.S.A. 13:8C-26j or 13:8C-38j, as applicable by letter sent by certified mail, return receipt requested, using the form provided by the Department, disclosing the location of all Highlands resource areas on the property and stating that an application for a waiver of the requirements of this chapter to permit development on the property has been filed and enclosing a copy of a fair market value appraisal, that was performed by a State-licensed appraiser and that assumed that the

minimum beneficial economically viable use of the property is allowable under local law; and

4. That no reasonable offer based upon the minimum beneficial, economically viable use for the property has been received;

i. Documentation for (g)3 and 4 above shall include the following:

(1) A copy of each letter that the applicant sent under this subsection;

(2) All responses received. Each response shall be submitted to the Department within 15 days after the applicant's receipt of the response;

(3) A list of the names and addresses of all owners of real property within 200 feet of the property as a whole, as certified by the municipality, including owners of easements as shown on the tax duplicate;

(4) Receipts indicating the letters were sent by certified mail; and

(5) A copy of the fair market value appraisal required under (g)3 above.

(h) After consideration of the information required in (g) above, the Department shall not approve a waiver under this section if an applicant has refused a fair market value offer to purchase the property for which

the waiver is sought or if there is an alternative to the proposed project that constitutes a minimum beneficial economically viable use for the property.

(i) Upon written notice from the Department advising a person that the conditions in (g) have been satisfied, the person may request a waiver under this section in accordance with N.J.A.C. 7:38-9.

(j) The Department shall complete a written analysis of the factors it considers under (c) above, which shall incorporate its decision on the request for a waiver under this section no later than 180 days from the Department's receipt of a complete request under (h) above.

(k) An HPAA with a waiver to avoid a taking of property without just compensation shall:

1. Allow only the minimum relief necessary to enable the property owner to realize the minimum beneficial economically viable use of the property as a whole, designed and built in a manner that will conserve the resources of the Highlands to the maximum extent possible; and

2. Ensure that any part of the property that the Department does not allow to be developed is protected from future development by a recorded conservation restriction containing those terms deemed necessary by the Department to preserve the undeveloped property and the mitigation plantings thereon, if any.

Supreme Court, U.S.
FILED
MAY 24 2010
OFFICE OF THE CLERK

No. 09-1288

In The Supreme Court of the United States

DAVID SHOPE, HANK KLUMPP, CHARLES SHOOP, ROBERT BEST, RUTH BEST, ANDREW DRYSDALE, LOIS DRYSDALE, JERRY W. KERN and SANDRA KERN,
Petitioners,

v.

THE STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL AND THE NEW JERSEY WATER SUPPLY AUTHORITY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The New Jersey Highlands is the source of over one-third of the state's drinking water. N.J. Stat. Ann. §13:20-2. "Major development" in the Highlands is regulated by the New Jersey Highlands Water Protection and Planning Act, N.J. Stat. Ann. §13:20-1, et seq., also known as "the Highlands Act" and requires a permit from the New Jersey Department of Environmental Protection ("NJDEP") pursuant to N.J. Admin. Code §7:38-1, et seq., unless the development is exempt from permit requirements under N.J. Stat. Ann. §13:20-28, et seq. (55a).

Farmers who own property in the New Jersey Highlands petition this Court to decide whether the Highlands Act takes property for governmental use without just compensation in violation of the federal constitution. The Court should deny the Petition because the matter was not pled below, nor would it have been ripe for review had it been pled.

The Highlands Act expressly excludes farming from permit requirements. N.J. Stat. Ann. §13:20-3 (definition of Major Highlands Development.) Construction of agriculturally-related structures in the Preservation Area that increase impervious cover on a farm between three percent and nine percent of the farm area only require approval of a farm conservation

plan by the local soil conservation district (SCD). Id. at -29a(1). Development that increases impervious cover on a farm by nine percent or more, requires approval of a resource management system plan by both the SCD and NJDEP. Id. at -29a(2). The Highlands Act also exempts farmers from the 50,000 gallon a day limit on diversion of Highlands Waters that apply to other Highlands water users. Id. at -30.b(3), §58:1A-5.1. Water diversions over 100,000 gallons per day are regulated by the Water Supply Management Act, N.J. Stat. Ann. §58:1A-1, et seq., and its implementing regulations, N.J. Admin. Code §7:20A, pursuant to N.J. Stat. Ann. §58:1A-15.1.

Petitioners never applied to NJDEP for a permit to develop their property or for a waiver of NJDEP permit rules authorized by N.J. Stat. Ann. §13:20-33b (67a) and N.J. Admin. Code §7:38-6.8 (69a). Furthermore, Petitioners' state court litigation never alleged a taking but instead sought to invalidate the Highlands Act entirely, and based the claim upon arguments having nothing to do with a regulatory taking.

In Count One of their complaint, Petitioners alleged that the Regional Master Plan enacted by the New Jersey Highlands Council under N.J. Stat. Ann. §13:20-8,-10 and -11, was enacted after the 18 month deadline in §8 and that the Act was, therefore, invalid. (40-41a). In Count Two, Petitioners alleged that the exemptions from the permitting requirements of the Highlands Act in N.J. Stat. Ann. §13:20-28 violated

their right to equal protection of the law because the exemptions were more valuable to small lot owners and disproportionately reduced the potential development value of larger properties. (40a-43a). In Count Three, Petitioners alleged that the State's failure to fund a Transferable Development Rights (TDR) program created in N.J. Stat. Ann. §13:20-13 rendered the Act invalid (40a,43a). In Count Four, Petitioners alleged that the Act was invalid due to a lack of scientific basis for the legislative delineation of the regulated area in §7. (40a,44a). The trial court granted the State's motion and dismissed the complaint in its entirety. The Appellate Division affirmed. County of Warren et als. v. State of New Jersey et als., 978 A.2d 312 (N.J. App. 2009)(9a). The New Jersey Supreme Court denied plaintiffs' petition for certification. (46a).

To the extent the Petition for certiorari is interpreted as raising a per se categorical takings claim on behalf of all farmers in the Highlands, the Petition should be denied because, as demonstrated above, the matter was not pled. Moreover, the claim is not facially sustainable because the Act not only exempts certain development from regulation, but also provides opportunities for development by way of a permit program which also allows NJDEP to waive those permit requirements to avoid a takings without just compensation, to protect public health and safety, or to allow redevelopment. N.J. Stat. Ann. §13:20-28,-32,-33.

The Court should also deny Petitioners' request to determine whether farming is a federal constitutional right. Petitioners introduced the claim by way of a motion to file a second amended complaint, as a supplement to petitioners' opposition the State's motion to dismiss. (Pb5). The trial court denied Petitioners' motion, and subsequently granted the State's motion to dismiss. During petitioners' motion for reconsideration of the order dismissing the Complaint, the trial court observed that Petitioners provided no proof that farming was either a protected right or a suspect classification. (34a).

Petitioners pursued their "right to farm" claim on appeal from the dismissal of their equal protection challenge to the Act's permit exemptions, arguing that the Highlands Act impinged upon the "right to farm" because the Act reduced the equity in larger properties by 75 percent as compared to smaller properties. (18a). Thus, Petitioners argued, the trial court erred in utilizing a rational-basis standard of review for their challenge to the Act's exemptions. The Appellate Division rejected the claim and concluded that the legislative decision to regulate more intense development on larger properties and to exempt from regulation more modest projects, such as one single family home on a lot, was rationally related to the legitimate governmental objectives in N.J. Stat. Ann. §13:20-2, which includes the goal of protecting the state's drinking water supplies and other natural resources from degradation by "piecemeal, scattered and inappropriate development" by adopting a regional

approach to land use development. (20a-21a, 24a).

Furthermore, the Appellate Division concluded, there was no constitutionally protected right to farm and thus, strict scrutiny of the Act's objectives and means was not indicated. (20a-21a, 24a). The appellate court further concluded that the Act did not preclude Petitioners from engaging in farming or deriving a beneficial use from their property. (18a-19a). The appellate court held that the Highlands Act only affects Petitioners' ability to develop their property in the most profitable manner, which is not a fundamental constitutional right. (19a). The Supreme Court declined Petitioners' request to review the decision.

Because the Highlands Act does not require a permit for farming, and Petitioners have not yet applied to NJDEP for a permit to develop their property or for a waiver of those permit requirements, the Court need not address Petitioners' constitutional claim and should dismiss the Petition.

ARGUMENT

I. CERTIORARI IS NOT WARRANTED ON PETITIONERS' CLAIM THAT THE HIGHLANDS ACT TAKES PROPERTY WITHOUT JUST COMPENSATION BECAUSE PERMITS AND PERMIT WAIVERS FOR DEVELOPMENT ARE AVAILABLE UNDER THE HIGHLANDS ACT AND PETITIONERS HAVE NOT APPLIED FOR THEM, RENDERING THEIR ALLEGATION OF A TAKING UNRIPE FOR REVIEW.

The Fifth Amendment to the United States Constitution prohibits the taking of private property "for public use without just compensation." U.S. Const. Amend. 5. Although the Petition asks this Court to determine whether the Highlands Act takes property without just compensation, Petitioners never raised the claim in their state court litigation and instead, challenged the validity of the Highlands Act on other grounds. Furthermore, a takings claim would not have been ripe for review if it had been pled, and the Petition should be rejected for this reason.

In Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed. 2d 126 (1985), the Court explained the requirement that a takings claim must be ripe. The Court held that a takings claim challenging the application of land-use regulations is

not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Id. at 186. A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of "all economically beneficial use" of the property pursuant to Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-1016, 112 S.Ct. 2886, 120 L.Ed. 2d 798 (1992), or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred under Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). These matters cannot be resolved in definitive terms until a court knows the extent of permitted development on the land in question. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351, 106 S.Ct. 2561, 91 L.Ed. 2d 285 (1986).

Because Petitioners have not applied for a Highlands permit or a permit waiver, there is no record of the uses permitted on Petitioners' property under the Highlands Act for this Court to review. The result is no different if the Petition is interpreted as a categorical taking claim on behalf of all Highlands farmers. A categorical or per se taking occurs when a regulation denies all economically beneficial or productive use of land. Lucas, supra, 505 U.S. at 1015-1016. However, in this case, a categorical takings claim is facially unsustainable. As the New Jersey Appellate Division observed (17a), agricultural

development does not need a permit under the Highlands Act pursuant to N.J. Stat. Ann. §13:20-3 which excludes farming from "major Highlands development" which requires a permit, and provides a means for farmers to build agriculturally-related structures on their property. Id. at -29a. Thus, the Highlands Act provides a beneficial use for Petitioners' property by allowing farming to continue. In addition, the Highlands Act also exempts certain non-agricultural development from regulation, Id. at -28, establishes a permit program which allows non-agricultural development that complies with permit requirements, Id. at -33a, and allows NJDEP to waive those permit requirements on a case-by-case basis to avoid a taking in the event the uses allowed by permit nevertheless deprive a property owner of their reasonable, investment-backed expectations. Id. at -33b(3).(19a).

For these reasons, the Court should deny the Petition insofar as it asks the Court to determine whether the Highlands Act takes property without just compensation.

II. THE COURT SHOULD DENY THE PETITION TO DECLARE FARMING A FUNDAMENTAL CONSTITUTIONAL RIGHT BECAUSE THE FACTS DO NOT REQUIRE ADJUDICATION OF THIS CONSTITUTIONAL QUESTION.

Farming is not a right under either the federal or New Jersey constitutions. Indeed, Petitioners admit that the only federal court to consider the matter has confirmed that farming is not a fundamental right. Pb15, citing United States v. Plume, 447 F.3d 1067, 1075 (8th Cir., 2006). At the state level, New Jersey's Right To Farm Act, N.J. Stat. Ann. §4:1C-1 to -10, only allocates jurisdiction over disputes between municipalities and commercial farms to the County Agricultural Board and the State Agricultural Development Committee, in order to ensure that farming activities are protected against unnecessary local interference. Twp. of Franklin v. Den Hollander, 769 A.2d. 467 (2001), aff'd, 796 A.2d 874 (N.J. 2002).

Despite a total absence of legal support, Petitioners allege that there is a constitutional right to farm and that New Jersey courts erred in applying the rational basis test to Petitioners' due process challenge to the exemption provisions of the Highlands Act, N.J. Stat. Ann. §13:20-28. The Appellate Division correctly rejected the claim, holding that there was no fundamental or constitutional "right" to farm and that Petitioners' equal protection claim was properly dismissed. (20a-21a, 24a).

The appellate court held that the legislative decision to regulate more intense development on larger properties under the Highlands Act and to exempt from regulation more modest projects, such as one single family home on a lot, was rationally related to the legitimate governmental objectives in N.J. Stat. Ann. §13:20-2, including the goal of protecting from degradation the state's drinking water supplies and the other natural resources. (20a-21a,24a). Plainly, larger, concentrated development projects on large land holdings have a greater capacity to adversely affect the environment as compared to one single family home and, thus, warrant regulation.

The Court will not pass upon a constitutional question if there is some other ground upon which the case may be disposed of. Slack v. McDaniel, 529 U.S. 473, 475, 120 S.Ct. 1595, 146 L.Ed. 2d 542 (2000). In this matter, the Court need not reach the constitutional question because the facts do not establish that the Highlands Act impedes the activity of farming. The Highlands Act neither requires a permit to farm property nor to construct agricultural buildings. N.J. Stat. Ann. §13:20-3, -29a. Instead, the permit requirements of the Highlands Act apply to non-agricultural development of property. Regulation of such development only implicates a constitutional right under the federal and state constitutions when it eliminates all or virtually all beneficial economic use of property and the property owner is deprived of just compensation for the loss of the property. As explained in Point I, Petitioners have not applied to NJDEP for

a permit to develop their property and thus, there is no ripe takings claim for adjudication.

For these reasons, the Court need not reach Petitioners' constitutional question and should dismiss the Petition.

CONCLUSION

For the foregoing reasons, the Petition for the writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

DAVID SHOPE, HANK KLUMPP, CHARLES SHOOP, ROBERT BEST, RUTH BEST, ANDREW DRYSDALE, LOIS DRYSDALE, JERRY W. KERN, and SANDRA KERN,

Petitioners,

v.

STATE OF NEW JERSEY, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL, and NEW JERSEY WATER SUPPLY AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

REPLY BRIEF

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ARGUMENTS IN REPLY

I. Petitioners' Claim that the Highlands Act takes Property Without Just Compensation is Properly Raised by a Writ of Certiorari and is Ripe for Review.

The decision by the Appellate Division rejecting Plaintiffs' facial equal protection challenge to the New Jersey Highlands Act addressed whether the Plaintiffs were asserting a Takings Claim although same was not specified in the pleadings. The Court indicated:

> "Finally, Plaintiffs have the opportunity to seek waivers under the Highlands Act to the extent they consider the Act's impact to constitute a taking of their property. *OFP*, *Supra.*, 395 N.J.Super. at 584-587.
>
> To the extent Plaintiffs assert a diminution in the value of their land, which would appear more directly related to their interests in selling or developing their land rather than farming it, they raise the issue of an unconstitutional taking already decided in *OFP*, *Supra.*, 395 N.J.Super. at 580-585."

The appropriate remedy from this final decision by the New Jersey courts on this Federal Constitutional question is a Writ of Certiorari to review this portion of the Court's decision. Petitioners' takings claims are not based upon their individual takings claims but rather the aggregate takings from all owners of undeveloped properties. The known average impact on property is a

75% diminution with an aggregate Fifteen Billion Dollars diminution in value in the 410,000 acre preservation area portion of the Highlands Region. The uncontradicted expert reports establishing this diminution in value are sufficient to establish the impact of the Highlands Act to a "reasonable degree of certainty." *Palazzo v. Rhode Island*, 533 U.S. 606, 620(2001).

Petitioners' assertion is that the New Jersey Highlands Act's only public purpose is preservation of undeveloped property as an end in itself. While this may be appropriate for exercise of powers to acquire private property for fair market value pursuant to Eminent Domain, it is not a lawful exercise of the State's police powers and is a taking without just compensation.

In order to make an application for a Highlands Waiver/Takings, New Jersey's administrative procedures require a farmer to forego farming and instead propose a development plan for the property and obtain a Highlands preservation area approval (HPAA), *N.J.S.A.* 13:20-33. The extraordinary expenses associated with this process and the requirement that the development be proposed for the "minimal beneficial use of the land" results in an economic futility, where it will cost more to obtain an approval than the value to develop the property for the permitted level of development. It is only after this economic futility has been denied that New Jersey provides a waiver/takings procedure.

When enacted, the Highlands Act required a permanent program that included "a provision that may allow for a waiver of any provision of a Highlands

permitting review on a case by case basis if determined to be necessary by the Department in order to avoid the taking of private property without just compensation." *N.J.S.A.* 13:20-33(b)(3). The regulations implementing this legislative direction did not implement the waiver "provision" in the sense of a one shot application for an administrative exception. Instead, it establishes a multi-layered waiver process requiring aggrieved land owners to fulfill numerous, discrete administrative steps to apply for and obtain an exception of the Highlands Acts' restrictions. In order to get through the waiver process, a property owner must:

1. Receive a determination from DEP that the proposed development does not meet all the requirements (of the Highlands Act) as strictly applied; *N.J.A.C.* 7:38-6.8(b);

2. Prosecute and conclude all administrative and legal challenges to that determination, *i.e.* seek a Writ of Mandamus or declaratory type of relief in New Jersey Courts. *N.J.A.C.* 7:38-6.8(b);

3. Prove there is no alternative to the proposed development that constitutes a minimum economically viable use. *N.J.A.C.* 7:38-6.8(c) (1);

4. Identify investments in the property as a whole on which regulated activities are proposed and whether the investments and expectations were "reasonable". *N.J.A.C.* 7:38-6.8(c) (1), *N.J.A.C.* 7:38-6.8(d)(1-3); *N.J.A.C.* 7:38-6.8(d)(1) I-(VI).

5. Identify the environmental impacts of the minimum viable and economically feasible use for the property as a whole, and the consistency of these impacts with the goals of the Highlands Act. *N.J.A.C.* 7:38-6.8 (c)(f) (1-7);

6. Prove that the property owner has made a good faith effort to transfer the property's development rights, and has not received an offer to receive the development rights. *N.J.A.C.* 7:38-6.8(g)(2);

7. Prove that the property owner has offered the property for sale at or below fair market value (based on an appraisal of the minimum beneficial economic use of the property) to neighboring property owners, conservancy organizations, and governmental agencies. *N.J.A.C.* 7:38-6.8(g)(3);

8. Prove that the property owner has not received a reasonable offer based upon the minimum beneficial economically viable use of the property. *N.J.A.C.* 7:38-6.8(g)(4).

As demonstrated by the foregoing, the Highlands Act waiver process inappropriately requires affected land owners to pursue and accept remedial measures. First, the property owner must pursue all of his or her "administrative and legal challenges to this determination," *i.e.* seek a Writ of Mandamus or declaratory type of relief in the courts. *N.J.A.C.* 7:38-6.8(b). This sort of procedure was expressly repudiated in *Williamson County Regional Planning Commission*

v. Hamilton Bank of Johnson City, 473 U.S. 172, 193(1985) which rejected the argument that a property owner had to bring an action for declaratory relief before a takings claim was ripe. The property owner must make a good faith effort to transfer the property's development rights and a landowner cannot refuse an offer to receive the development rights. *N.J.A.C.* 7:38-6.8(g)(2). The Supreme Court has expressly rejected this TDR remedy as a valid ripeness requirement. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997).

Petitioners would be required to offer their property for sale to neighbors, land conservancies, environmental organizations, and government agencies at a value adjusted to the respective property's minimal economically viable use; *i.e.* at the depressed value after regulation by the Highlands Act. *N.J.A.C.* 7:38-6.8(g)(3),(4). This procedure undermines long established Constitutional protections recognizing the prohibition against the government from depressing land values for the purpose of acquiring property for public use for less than market value. Just compensation requires payment of market value of the property before enactment of value depressing regulations. *United States v. Reynolds*, 397 U.S. 14,15-17(1970). As noted in *United States v. Virginia Electric & Power Company*, 365 U.S. 624, 636 (1961):

> "It would be manifestly unjust to permit a public authority to depreciate property values . . . and then to take advantage of this depression in the price which it must pay for the property when eventually condemned." (Internal quotation and citation omitted)

The decision by the Appellate Division determining Petitioners' takings claims can only be reviewed by a Writ of Certiorari to the United States Supreme Court. Absent such review, Petitioners will be left with an administrative process for an HPAA which is an economic futility and forced to comply with waiver/takings provisions which violate established principles of Constitutional Law. In a very real sense, Petitioners and all other property owners within the preservation area will be effectively left without a remedy for this massive takings by the State of New Jersey.

II. The Facts Mandate that the Court Grant Plaintiffs' Petition to Declare Farming a Fundamental Constitutional Right.

The impact of the Highlands Act on farming is based on the 75% diminution in value of undeveloped property within the New Jersey Highlands preservation area. While the Highlands Act contains numerous provisions purportedly promoting the practice of farming, this loss in equity makes it impossible for a farmer to continue farming the land as a livelihood. While a farmer's equity reflects the development potential of the land, it is not synonymous with an interest in developing or selling the land. A farm's equity is needed as collateral to borrow against for equipment purchases, capital improvements, working capital, and to buffer lean years. Land value is the primary asset of a farm business. Accordingly, the facts mandate that the Court grant Plaintiffs' Petition to declare farming a fundamental constitutional right.

The absence of case law other than the distinguished *United States v. Plume*, 447 F.3d 1067 (8th Cir. 2006) demonstrates the need for review of this right rooted in Divine and Natural Rights.

The legal fiction 410,000 acre Preservation Area violates Petitioners' equal protection rights when subject to the strict judicial scrutiny required for a statute which interferes with a fundamental right.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request the Supreme Court grant review of this matter.

Respectfully submitted,

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